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# Court Review

Volume 47, Issues 1-2

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

CHARLES EVANS WHITTAKER  
UNITED STATES COURTHOUSE



## SPECIAL ISSUE ON MEDIA MATTERS

- Three Perspectives on the CSI Effect
- Handling High-Profile Cases
- Ten Tips for Dealing with the Media



# Court Review

Volume 47, Issues 1-2

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION  
Volume 47, Issues 1-2

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## EDITOR'S NOTE

**T**his special issue of *Court Review* focuses on media matters. One provocative question related to media is the purported impact of an iconic television show, *Crime Scene Investigation (CSI)*, on the judicial process. In the past few years, it has been frequently suggested, especially in the media, that judges, prosecutors, defense attorneys, and jurors have become influenced by *CSI*. The allegation is that the “CSI-effect” has resulted in an expectation that forensic evidence is required for successful criminal prosecutions. But is there (apologies to Gertrude Stein) a there there? Three articles in the special issue examine the so-called CSI-effect. Professors Steven Smith, Veronica Stinson, and Marc Patry of Saint Mary’s University (Halifax, Nova Scotia) find evidence there is, but they wonder whether the effect is not a juror-problem but rather manifests itself in the ways that attorneys behave. Judge Donald Shelton (also an adjunct professor, Thomas Cooley Law School and Eastern Michigan University) and his colleagues, Professors Gregg Barak and Young Kim (Eastern Michigan University), have found something is going on, but suggest it is a “tech effect” rather than a specific effect of television shows such as *CSI* or *Law and Order*. Professors Cole (University of California, Irvine) and Dioso-Villa (Griffith University, Brisbane, Australia) are skeptical but provide valuable guidance for protecting the judicial system against any impacts from real or imagined effects.

Media issues are more than just reactions to TV shows, of course. Media are often the leading edge of the public in how they view or understand law and the courts. Judge Alsdorf (now jurist-in-residence at Seattle University School of Law and private practice arbitrator/mediator) offers a comprehensive view of how judges might think about handling cases, including communications in orders, decisions, and otherwise in working with the media. His tips stem from high-profile-case management, but are applicable as well for judicial interactions in many cases. Judge Leben offers 10 tips for judges culled from his time on the bench and his background and contacts in the communications field. Also relevant to the special issue is the book review of *Courts and Judges on Trial* by an Australian academic and jurist, Dr. Cannon; the book is authored by Pamela Schulz, an Australian scholar, and it analyzes judicial and media relationships, as well as judicial relationships with elected officials. The last item in the issue is an AJA bylaws amendment for membership to review.

Stay tuned!—Alan J. Tomkins, Co-Editor



*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 45. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Photo credit: Mary Watkins (mayrswatkinsphoto@earthlink.net). The cover photo is the Charles Evans Whittaker United States Courthouse in Kansas City, Missouri. The 12-story, crescent-shaped courthouse is named for Justice Charles Evans Whittaker, who served on the United States Supreme Court from 1957 to 1962. Before that, Whittaker had been a federal district judge in Kansas City and a judge on the United States Court of Appeals for the Eighth Circuit.

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# President's Column

Mary Celeste

Time flies when you are having fun! This will be my last message to you as president of the AJA. I would like to take this opportunity to thank the membership, the Board of Governors, the Executive Committee, and Shelley Rockwell, our Association Manager, for giving me this opportunity and for your continued support.

I would like to highlight some of the activities during my tenure. Along with attending national conferences, I am organizing and coordinating the AJA Symposium/Workshop scheduled for the 2012 midyear conference in Nashville—a midyear meeting NOT to be missed!

I have also participated in “branding” the AJA. This branding has established a website address that specifically utilizes the AJA name as opposed to an address with an address flowing from the National Center for State Courts’ website. The new website address is [www.american-judgesassociation.net](http://www.american-judgesassociation.net). The .org was already taken by the American Jailers Association—somewhat of a far cry from our mission. In that vein, I have also worked to further the reach and use of our exclusive trademark, the “Voice of the Judiciary.®” I am also developing a children’s school education project with Judge Charles Gill’s nonprofit organization. We are hoping to secure joint funding from the Bill Gates Foundation.

Lastly, and I believe most importantly, I continue to foster relations with National Center for State Courts (NCSC), the National Association for Court Management (NACM), the National Association of State Judicial Educators (NASJE), and the National College of Probate Judges (NCPJ). We just con-

tracted with NCSC to assist the AJA in securing more vendors for our conferences and, therefore, more conference revenue. I attended the NACM midyear meeting and participated in a panel discussion; they are reciprocating by sending panelists to our San Diego conference. We attempted to join NASJE for a conference but were unable to do so at this time. But did how-ever connect with NCPJ for a joint conference in 2013 or 2014. And we positioned the AJA very well for joint judicial confer-

ences with conference-site states as we did in Colorado. We will be having a joint conference with California judges in San Diego this September, with Louisiana judges in 2013, and potentially with Washington, Oregon, and Canadian judges in 2015.

As I reflect upon my tenure, I keep thinking about the future of our association. Will we have the leadership necessary not only to carry out the mission of the association but to grow it? We have had many great leaders over the years, and as I look at the faces that continue to participate

in committees and conferences, I am hopeful that more judges will come forward and take the wheel.

We now have in place a strategic plan. Keep your eye out for a special update report on it. With this plan, inspired leadership, and a motivated membership, we can continue to develop this association as the preeminent judicial organization. So if you have a desire to become a leader in this association, now is the time to come forward. Apply for the officer and Board of Governor’s positions. Attend an Executive Committee meeting and bring yourself and your ideas along. An organization is only as good as its members. Farewell.



## AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

### 2011 Annual Conference

San Diego, California  
Westin Gaslamp  
September 11-16  
\$199 single/double

### 2012 Midyear Meeting

Nashville, Tennessee  
Doubletree Hotel  
May 17-19  
\$129 single/double

### 2012 Annual Conference

New Orleans, Louisiana  
Sheraton New Orleans  
September 30-October 5  
\$169 single/double

### 2013 Annual Conference

Kohala Coast, Hawaii  
The Fairmont Orchid  
September 22-27  
\$219 single/double

# Fact or Fiction? The Myth and Reality of the CSI Effect

Steven M. Smith, Veronica Stinson, & Marc W. Patry

Anyone who has been to a crime lab or experienced the presentation of forensic evidence in open court knows that there is a disconnect between the way forensic science is depicted on popular television programs and the reality of criminal investigations. The number of forensically themed television shows and popular entertainment has exploded over the last decade, and shows such as *Crime Scene Investigation* (CSI) and its related spin-offs are among the most popular shows in North America. Indeed, CSI is consistently among the top ten shows in a given week,<sup>1</sup> and CSI: Miami was rated the most popular television show in the world in 2005.<sup>2</sup> These and other television crime dramas,<sup>3</sup> “true life” crime shows,<sup>4</sup> and popular books<sup>5</sup> have piqued interest in the power of forensic analysis to solve crimes. This has not remained in the fictional realm. Recently, newspapers and television news programs have focused on new forensic techniques, and frequently focus on the importance of forensic evidence presented in real life trials<sup>6</sup> for convicting the guilty.

Perhaps not surprisingly, this perceived increase in interest in forensic investigations and the value of forensic science has made people wonder what effect, if any, it may be having on juror decision making and jury verdicts. The news media<sup>7</sup> are also wondering, and have been exploring opinions and providing anecdotes of how television crime dramas may be influencing the ways in which people think about criminal investigations and behave relative to the legal system.<sup>8</sup> Perhaps due to its prominence on television (episodes can be seen at any time of day in most time zones) the media has typically referred to this potential influence as the “CSI effect.”

## WHAT IS THE CSI EFFECT?

Typically, media reports of the CSI effect include references to an undesirable effect exhibited during jury trials, which results from jurors’ reactions to the presence or absence of “appropriate” scientific evidence as trial exhibits.<sup>9</sup> Essentially, the argument is that watching CSI causes jurors to have unrealistic expectations about the quantity, quality, and availability of scientific evidence.<sup>10</sup> When the scientific evidence presented at trial fails to meet jurors’ television-enhanced expectations, they are more likely to acquit the defendant. This version of the CSI effect is what Cole and Dioso-Villa call the Strong Prosecutor’s Effect.<sup>11</sup>

Cole and Dioso-Villa also refer to the Weak Prosecutor’s Effect, which focuses on the effect that CSI may have on prosecutors’ behaviors.<sup>12</sup> Specifically, the Weak Prosecutor’s Effect describes behaviors designed to counter jurors’ supposed heightened expectations of forensic science. These are essentially tactical changes that do not necessarily change trial outcomes, but are relevant to the legal community. A less common version of the CSI effect—at least as reported by the media—is one that favors the defense bar.<sup>13</sup> This position argues that the favorable portrayal of forensic scientists in the media increases their credibility, making their testimony highly compelling and influential in verdicts.

The CSI effect is being discussed in legal circles<sup>14</sup> and in legal decisions. Most notably, in *State v. Cooke*, the Superior Court of Delaware explored the relevance and impact of the CSI effect.<sup>15</sup> In this case, Cooke challenged the prosecution’s use of ten types of forensic evidence (including DNA, footwear impressions, tool marks, handwriting, and fabric impressions, among others) as being either exculpatory or unreliable, and as

## Footnotes

1. The Nielsen Company [no author], April 15, 2011, <http://www.nielsen.com/us/en/insights/top10s/television.html>.
2. BBC News [no author], July 31, 2006, <http://news.bbc.co.uk/2/hi/entertainment/5231334.stm>.
3. E.g., *Crossing Jordan*, *Bones*, and *Law & Order* and its spin-offs.
4. E.g., *The First 48*, *Cold Case Files*, and others.
5. E.g., the best-selling Kathy Reichs novels.
6. E.g., the O.J. Simpson and Robert Blake murder trials.
7. E.g., *USA TODAY*, *THE TORONTO STAR*, *CNN*.
8. See Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 *YALE L.J.* 1050, 1050-85 (2006); Kimberlianne Podlas, “The CSI Effect”: *Exposing the Media Myth*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 429, 429-65 (2006).
9. See Tyler, *supra* note 8, at 1052; Podlas, *supra* note 8, at 433.
10. See e.g., Marc W. Patry, Steven M. Smith & Veronica Stinson, *CSI Effect: Is Popular Television Transforming Canadian Society?*, in

COMMUNICATIONS IN QUESTION: CANADIAN PERSPECTIVES ON CONTROVERSIAL ISSUES IN COMMUNICATIONS STUDIES 291 (Joshua Greenberg & Charlene Elliot eds., 2008); Steven M. Smith, Marc W. Patry & Veronica Stinson, *But What is the CSI Effect?: How Crime Dramas Influence People’s Beliefs about Forensic Evidence*, 5 *CAN. J. POLICE & SECURITY SERVICES* 187, 187-95 (2007); Veronica Stinson, Marc W. Patry & Steven M. Smith, *The CSI Effect: Reflections from Police and Forensic Investigators*, 5 *CAN. J. POLICE & SECURITY SERVICES*, 125, 125-33 (2007).

11. Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 *NEW ENG. L. REV.* 435, 435-69 (2007), at 447.
12. Cole & Dioso-Villa, *supra* note 11, at 448.
13. Tyler, *supra* note 8, at 1064; Cole & Dioso-Villa, *supra* note 11, at 448.
14. E.g., Michael D. Mann, Comment, *The “CSI Effect”: Better Jurors through Television and Science?*, 24 *BUFF. PUB. INT. L.J.* 211 (2006).
15. *State v. Cooke*, 914 A.2d 1078 (Del. 2007).

such it should have been excluded.<sup>16</sup> The State argued that it needed to produce this evidence for the jury for two reasons: 1) to demonstrate to the jury that it has a solid case grounded in the products of a thorough investigation; and 2) to offset the heightened expectations of the prosecution that the State believes jurors hold due to the CSI effect. Interestingly, although the Court found that there was no scientific evidence to support the existence of the CSI effect, it also could not deny its own experience of juries' heightened expectations of forensically relevant evidence.

Some attorneys and trial consultants have also noticed this purported increase in jurors' expectations and have incorporated this issue into their trial strategy. Consider the well-publicized case of Robert Durst who was acquitted of murder. In this case, defense jury consultant Robert Hirschhorn's jury selection strategy included using CSI viewing habits as a criterion for retaining prospective jurors. "In the Durst case...we had a lot of jurors . . . that watched those kinds of shows because we knew that the fact that the head was missing, and the head of Morris Black was where the cause of death was, in the absence of that, the prosecution couldn't win. . ."<sup>17</sup>

As both Winter and York<sup>18</sup> and the *State v. Cooke* decision<sup>19</sup> suggest, the lack of clarity surrounding the CSI effect puts the prosecution in an awkward position. If the prosecution presents forensic evidence simply for the sake of presenting such evidence, it risks criticism for presenting irrelevant exhibits. Alternatively, not presenting such evidence means the prosecution risks disappointing the jury. Winter and York end their review of the case by calling for additional empirical evidence to be brought to bear on the question of the nature and impact of the CSI effect. Because several empirical studies have been published since the *State v. Cooke* decision, the purpose of this paper is to provide an overview of what is currently known about the nature and impact of the so-called CSI effect.

## RECENT RESEARCH ON THE CSI EFFECT

One of the first in-depth analyses of the CSI effect came from an examination of the perceptions and behaviors of members of the Maricopa County Prosecuting Attorney's Office.<sup>20</sup> Maricopa County conducted a survey of 102 prosecutors to assess how lawyers perceived CSI and related shows to be having an impact on legal proceedings. Importantly, the Maricopa County report also addressed how prosecutors are responding to the perceived impact of the CSI effect. One result of the sur-

vey is clear—these lawyers believe CSI is having an effect on jurors. Thirty-eight percent of attorneys reported they had lost a case because of the CSI effect; 45% contended that jurors relied on scientific evidence more than they should; and 72% maintained that CSI fans exerted undue influence on other jurors. In terms of solutions to the problem, 70% of prosecutors asked jurors about television-viewing habits during *voir dire*, 90% took the time to explain police procedures to jurors during testimony, and an astounding 52% plea bargained cases when they thought CSI-educated jurors might object to the evidence (or lack thereof) presented in the case. It is clear that CSI is having an effect on some prosecutors, but the question of whether or not it influences other players in the legal system remains to be answered.

If it is true that there is no real CSI effect, the approach of trying to counter the *perception* of a CSI effect may be counterproductive, as countering a bias that does not exist may actually backfire. Indeed, the social psychological literature is clear that instructions (e.g., judicial instructions given to a jury before deliberations) designed to overcome a bias are most effective if one is clear about the nature and corrections of the existing bias.<sup>21</sup> Incorrect assessment of bias can lead to people over- or under-correcting for that bias.<sup>22</sup> Of course, the legal community is interested in whether or not crime dramas influence jury outcomes.

To date, little evidence addresses this question, but two studies inform this issue. In Podlas's study, participants read a scenario of an alleged rape, which was based entirely on the credibility of witnesses (no forensic evidence was presented), then rendered a verdict and reported on the basis for their decision.<sup>23</sup> Importantly, Podlas also examined the extent to which CSI-viewing habits influenced juror decisions. Podlas found that frequent viewers of CSI were no more likely to cite the lack of forensic evidence for their not-guilty verdicts as compared to infrequent viewers.

In a survey of 1,027 Michigan prospective jurors, Shelton, Kim, and Barak found that 46% of summoned jurors expected to see some kind of scientific evidence as part of the prosecution's case.<sup>24</sup> When asked to consider more serious charges (e.g., murder), the proportion of summoned jurors who expected to see forensic evidence increased to 74%. Interestingly, watching CSI was only marginally associated with increased expectations of scientific evidence and assessments of guilt, but the reasons for this trend are unclear.

16. Ryan J. Winter & Rachel M. York, *The "CSI Effect": Now Playing in a Courtroom Near You?*, 38 MONITOR ON PSYCHOL. 54 (2007) (for a more in-depth review of this case).

17. Robert Hirschhorn on American Morning, August 6, 2004, <http://transcripts.cnn.com/TRANSCRIPTS/040806/ltm.04.html>.

18. Winter & York, *supra* note 16, at 54.

19. *State v. Cooke*, 914 A.2d 1078 at 1088.

20. Maricopa County Attorney's Office, CSI: MARICOPA COUNTY: THE CSI EFFECT AND ITS REAL-LIFE IMPACT ON JUSTICE (2005), available at [http://www.ce9.uscourts.gov/jc2008/references/csi/CSI\\_Effect\\_report.pdf](http://www.ce9.uscourts.gov/jc2008/references/csi/CSI_Effect_report.pdf)

21. See e.g., Duane T. Wegener, Norbert L. Kerr, Monique A. Fleming

& Richard E. Petty, *Flexible Correction of Juror Judgments: Implications for Jury Instructions*, 6 PSYCH PUB POL. & L. 629, 629-54 (2000).

22. See Duane T. Wegener & Richard E. Petty, *The Flexible Correction Model: The Role of Naïve Theories of Bias in Correction*, in 29 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 141 (Mark P. Zanna ed., 1997).

23. Podlas, *supra* note 8, at 454.

24. Donald E. Shelton, Young S. Kim & Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 VANDERBILT J. ENT. & TECH. L. 331, 349 (2006).

## RECENT RESEARCH ON THE CSI EFFECT

In addition to the above cited research, we have conducted a substantial amount of research exploring the nature and consequences of the CSI effect. We first wanted to achieve a comprehensive understanding of how the CSI effect was described in the media. Therefore, we analyzed 250 newspaper articles from a broad array of media outlets. We found that the CSI effect tended to be described as having one of four impacts: 1) increasing student interest in forensically relevant topics (e.g., anthropology, biology, psychology), which results in higher student enrollments in relevant courses and programs; 2) educating criminals in how to engage in criminal activity without getting caught; 3) influencing jurors to acquit defendants; and 4) influencing how lawyers and other legal professionals behave. Interestingly, these news reports frequently characterized the CSI effect as having a negative effect.

Our next study was a content analysis<sup>25</sup> of the first seasons of *CSI* and *CSI: Miami*.<sup>26</sup> We documented the types of forensic procedures portrayed, the frequency of errors, and the frequency with which criminals were caught. We identified that in the two first seasons, over 75 types of forensic evidence were portrayed in the various storylines. The two most popular forms of evidence presented in any particular storyline were DNA (19%) and fingerprinting (12%). Consistent with Tyler's expectations, the criminal was caught in 97% of the storylines.<sup>27</sup> Importantly, technical errors and mistakes were rare and were always caught before any negative consequences could arise. Contrary to real-life investigation, crime scene investigators conducted 72% of the scientific tests portrayed on *CSI*. In actual investigations, specialized laboratory technicians conduct the majority of tests. Thus, there appears to be a clear difference between actual forensic investigations and their popular portrayals.

To assess the discrepancies between reality and fiction, we conducted a survey of 15 forensic experts employed by Canadian police agencies.<sup>28</sup> Participants were selected for their expertise in specific areas of forensic analysis, including identification services, major crimes, police dog service, blood stain analysis, audio and video analysis, facial identification artistry, firearms, biology, anthropology, odontology, traffic, entomology, and forward-looking infrared. The forensic experts were presented with a catalogue of 73 forensic techniques. Each technique was identified by name and a description of how the technique was portrayed on *CSI*. Experts commented only on those forensic techniques for which they had

expertise. Overall, experts indicated that the accuracy levels of the *CSI* shows to be relatively low, rating them as 2.5 on a 7-point scale. The specific techniques however, were given relatively positive ratings. The realism of the procedures was above the midpoint of the 7-point scale ( $M = 4.6$ ), and experts reported that the scientific research supporting the use of the portrayed techniques was quite high ( $M = 5.9$ ). The reliability/accuracy of the techniques, however, were rated quite low on the scale ( $M = 1.9$ ), which likely reflects that *CSI* often portrays highly technical, experimental techniques.

In two subsequent studies we surveyed other legal professionals to assess their views on the CSI effect itself.<sup>29</sup> First we surveyed 127 death investigators<sup>30</sup> on their perceptions of the CSI effect, as well as the extent to which watching crime dramas had influenced their day-to-day interactions with the public. The death investigators confirmed that crime dramas are somewhat inaccurate in their portrayals, and have changed the way in which police practice, investigate, and interact with the public. The vast majority (94%) indicated that television crime shows had influenced the public's expectations of their profession and conduct. Our next study asked a similar set of question for 36 "on the beat" police officers, but added follow-up questions on the extent to which *CSI* and similar shows influenced juries, criminal behaviors, and perceptions of the legal system. Although most of the police officers (68%) indicated that *CSI* had no effect on their behavior, consistent with the death investigators study, almost all (92%) indicated that the shows had some effect on public expectations. Interestingly, all respondents felt that *CSI* affected people's *perceived* knowledge of forensic techniques, but most thought that knowledge gained from these shows was inaccurate. Police officers estimated that the shows depicted a 94% solution rate (very similar to our content analysis findings), yet they estimated that only 40% of crimes are solved in the real world.<sup>31</sup>

We next turned to the impact crime dramas may be having on potential jurors.<sup>32</sup> We surveyed 320 jury-eligible adults from a wide range of age and employment backgrounds on their perceptions of several types of evidence, including DNA, fingerprinting, toxicology, confession evidence, eyewitness evidence, compositional description of materials (e.g., the percentage of base materials found in bullets), arson evidence, physical pathology, ballistics, matching (i.e., fiber), and handwriting analysis. DNA and fingerprint evidence were consistently rated by the public as significantly more reliable than other forms of evidence.

25. Content analysis, in this context, means that we coded the data about the television programs (these data are termed "qualitative" data), established interrater reliability (meaning that we calculated the degree of congruence between independent raters), and determined quantitative estimates of the program elements (e.g., DNA, fingerprinting, etc.) discussed in this paragraph.

26. See Patry et al., *supra* note 10, at 294.

27. Tyler, *supra* note 8, at 1050.

28. See Marc W. Patry, Veronica Stinson & Steven M. Smith, *Blurring the Line between Fact and Fiction: Expert Opinions about Forensic Investigation Tools Represented on CSI*, in PROCEEDINGS OF THE 2007 NORTH AMERICAN CORRECTIONAL AND CRIMINAL JUSTICE PSYCHOLOGY

CONFERENCE (2008), pp. 94-97).

29. See Stinson et al., *supra* note 10, at 125.

30. Eighty-three police officers, 28 medical examiners, 7 fire/arson investigators, and 6 others.

31. See Stinson et al., *supra* note 10, at 130.

32. Steven M. Smith, Veronica Stinson, and Marc W. Patry, *Exploring the CSI Effect: Is It Real? If so, What Is It?*, Address at North American Correctional and Criminal Justice Psychology Conference, in PROCEEDINGS OF THE NORTH AMERICAN CORRECTIONAL & CRIMINAL JUSTICE PSYCHOLOGY CONFERENCE, 2008, at 83., at 83.



Of course, the real question is, how are public perceptions influenced by television-viewing habits? To assess this we collected data from 148 participants on beliefs regarding forensic evidence (as above) and their self-reported viewing of *CSI* and *Law and Order* (as well as almost 30 other television programs).<sup>33</sup> Increased viewing of forensically themed crime dramas predicted favorable views toward a number of types of scientific evidence (but importantly, not non-scientific evidence). Thus watching *CSI* and related shows does seem to influence beliefs about forensic evidence. Of course, the reverse may be true—perhaps people who believe in the validity of these techniques gravitate toward crime drama for their entertainment. Thus, the causal relationship was not yet established. Therefore, we conducted another study to test a causal link between exposure to *CSI* and attitudes toward forensic evidence.

We randomly assigned 190 university students to watch zero, four, or eight episodes of *CSI*.<sup>34</sup> Compared to those who did not view *CSI*, participants who watched four to eight episodes of *CSI* had higher estimates of the accuracy and reliability of DNA and fingerprint analysis, and had more confidence in their judgments about the reliability of DNA analysis. It is quite possible that this effect occurs because DNA and fingerprint analysis are the techniques most commonly portrayed on the show. Nonetheless, this study shows that with exposure to as few as four episodes of *CSI*, people's perceptions of forensic evidence can start to change.

In the final study we will present here, perhaps most relevant to legal proceedings, we explored the extent to which people's attitudes toward forensic evidence can be altered based on interventions. Specifically, in an attempt to counter the impact of television crime dramas on potential jurors' attitudes, we showed 63 jury-eligible adults a video titled "Reasonable Doubt," produced by CNN. The video has four segments, which provide a critical examination of the quality of DNA, compositional, fingerprint, and fiber evidence. After watching the video (initial attitudes had been recorded weeks earlier in an ostensibly unrelated task) participants rated forensic techniques as less reliable. Importantly, and consistent with our previous work, watching the documentary did not influence ratings of non-scientific evidence (motive, opportunity, confessions, and alibi evidence).

## SUMMARY AND CONCLUSIONS

To date, and based on the results of the studies we and others have conducted, it seems clear that some form of CSI effect does exist. In addition to bringing their life experiences and common sense to the deliberation room, jurors may also be bringing their understanding of the legal system and forensic evidence as portrayed on recent episodes of *CSI* and *Law and Order*. Shelton et al. suggest that the source of jurors' increased expectations of forensic evidence is not simply television crime dramas but the result of a more widespread cultural change

linked to a technological and scientific revolution.<sup>35</sup> They argue that a more accurate term for this phenomenon is the "tech effect."<sup>36</sup> Regardless of which terminology is used, are jurors' demands for and expectations surrounding forensic evidence jeopardizing justice? To our knowledge, there is no evidence supporting this notion.

It also seems clear that some lawyers believe television crime dramas affect juror expectations of forensic science and are modifying their trial strategies to compensate for an anticipated CSI effect. Are these countermeasures justified? What consequences might these actions have? An important and related question that remains unanswered is how the CSI effect influences trial proceedings. The results of our research, as well as the research done by the Maricopa County Prosecutors' office, suggests that legal professionals are working to counter the CSI effect. Yet, to date there is no evidence that the CSI effect has any influence on jury decision making.

Thus, based on research by Wegener et al.,<sup>37</sup> we must ask if the effort made by prosecutors to counter the CSI effect may in fact be creating a problem rather than solving one. Indeed, our research suggests that people who watch *CSI* judge forensic evidence to be *more* reliable and accurate. This supports the notion of a pro-prosecution bias when that evidence is provided at trial.<sup>38</sup> Understanding the nature and magnitude of any bias is necessary before any intervention is appropriate, or else a larger problem could be created than the one being "fixed."

Many questions surrounding the CSI effect remain unanswered. More research is needed to understand fully the nature and consequences of watching television crime dramas on jurors. Although television crime dramas appear to be influencing people's views of forensic evidence, the police, criminal investigations, and the courts, there is to date no evidence that television crime dramas influence either jury decision making or trial outcomes.



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33. See Smith et al., *supra* note 10, at 189.

34. See Smith et al., *supra* note 10, at 190.

35. See Shelton et al., *supra* note 24, at 362.

36. *Id.*

37. See Wegener et al., *supra* note 21, at 629.

38. See, e.g., Tyler, *supra* note 8, at 1050.

# Studying Juror Expectations for Scientific Evidence:

## A New Model for Looking at the CSI Myth\*

Donald E. Shelton, Gregg Barak, & Young S. Kim

After a jury acquittal, the prosecutor explains the loss to the assembled media by saying that the jurors demanded too much of the government. They “wrongfully” acquitted the defendant only because the television show *Crime Scene Investigation* (“CSI”), or one of its many spin-offs and copycats, overly influenced them. According to the prosecutor, the jurors could not separate reality from fiction when they did not see the same kinds of advanced scientific evidence during the trial that is commonly depicted on their television screens. This fictional scenario is played out in many criminal cases. The news media quickly coined the term “CSI effect” to refer to these common prosecutorial anecdotal complaints, and it has been repeated and republished since CSI first aired nine years ago.<sup>1</sup> The popular media has almost universally accepted the prosecutor’s explanation for such jury acquittals as true and has helped to construct the CSI effect as a serious problem for the criminal justice system and a threat to the sanctity of the jury system.

The media-coined phrase “CSI effect” generally refers to the allegation that jurors who watch CSI, or similar television programs, expect and demand scientific forensic evidence as portrayed on these shows and, when such evidence is not produced, that jurors wrongfully acquit defendants. The genesis of the CSI effect on jury acquittals was anecdotal and subjective, based primarily on the opinions of prosecutors, judges, and other law enforcement officials.<sup>2</sup>

In 2006, we tested the validity of this popular notion and conducted the first empirical study of the alleged CSI effect on summoned jurors (the Washtenaw County Study). The study involved a survey of 1,027 summoned jurors in Washtenaw County, Michigan, about their television-watching habits, their expectations for scientific evidence in particular types of cases, and their likely verdicts in those particular cases when faced with scenarios featuring various types of evidence.<sup>3</sup> The data showed that jurors had increased expectations for scientific

evidence, and that in cases based on circumstantial evidence, jurors would be more likely to acquit a defendant if the government did not provide some form of scientific evidence. However, the Washtenaw County Study data also showed no significant correlation between those expectations and demands and whether the jurors watched CSI or similar programs on television.<sup>4</sup> We speculated that the cause of these heightened juror expectations and demands represents a broader change in our popular culture regarding the use of modern science and technology, buttressed by media portrayals of those scientific advances. We suggested that these evolving expectations and demands could more accurately be called a “tech effect.”<sup>5</sup>

Washtenaw County is a suburban county in southeast Michigan with a large university population. The demographics of the jurors showed a very high educational level consistent with that setting. We thought it important, therefore, to undertake a similar survey in a different jurisdiction. This follow-up study in 2009 (the Wayne County Study) surveyed jurors in Wayne County, which is centered in Detroit and is the most populous jurisdiction in Michigan. It is a metropolitan jurisdiction and the thirteenth most populous county in the nation. The racial, educational, and income demographics of the jurors in Wayne County are significantly different from the demographics of the jurors in Washtenaw County.

The Wayne County study also explored the suggestion of a broader tech effect rather than a television-based CSI effect, or even a more general effect of all media sources acting alone or possibly in combination, as the causative agent for the increased juror expectations and demands seen in the Washtenaw County study. Similarly, the juror questionnaire in the Wayne County study included additional questions that were meant to gauge the jurors’ technological knowledge, use of modern technology, interest in criminal justice news and development, assumptions about the availability of modern

### Footnotes

\* This article is an abridged and revised version of a report of the authors’ study originally published as *An Indirect-Effects Model of Mediated Adjudication: The CSI Myth, the Tech Effect, and Metropolitan Jurors’ Expectations for Scientific Evidence*, 12 VAND. J. ENT & TECH. L. 1 (2009). The authors appreciate the cooperation of Wayne County Circuit Judge Edward Ewell, Jr. and the staff of the Wayne County Circuit Court Jury Services Office, including Mary Kay Wimsatt, Ilene Marschner, Kari Komienky, Gina Jackson, and Audrey Mitchell.

1. See Donald E. Shelton, Young S. Kim & Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence:*

*Does the “CSI Effect” Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 335-36 (2006); Simon A. Cole and Rachel Dioso-Villa, *Investigating the “CSI Effect” Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1339 (2009).

2. See Andrew P. Thomas, *The CSI Effect on Jurors and Judgments*, 115 YALE L.J. POCKET PART 70 (2006), <http://www.thepocketpart.org/2006/02/Thomas.html> (discussing the results of a survey of Maricopa County prosecutors regarding the CSI Effect); Shelton et al., *supra* note 1, at 335-36.

3. Shelton et al., *supra* note 1, at 337-43.

4. *Id.* at 367.

5. *Id.* at 364.

forensic science capabilities in their local police crime laboratories, and expectations about how and when those capabilities would be used.

### THE CSI EFFECT AND THE TECH EFFECT

To determine the existence of the CSI effect, it is necessary to separate and define the claimed effects, including the observable attitudes and actions of jurors with regard to scientific evidence, as well as the potential causes of that juror behavior—such as watching CSI-type programs on television. With respect to the claimed effects, the 2006 Washtenaw County study showed high levels of juror expectations and demands that the prosecutor would present scientific evidence. The more recent Wayne County study reinforced those observations and revealed even higher levels of juror expectations for scientific evidence in metropolitan jurors. However, as in the Washtenaw County study, the Wayne County study showed that most jurors still appeared to trust eyewitnesses, perhaps misguidedly, and will rely on factual testimony to find that the government has met its burden, even in the absence of scientific evidence. Thus, jurors are not necessarily prepared to acquit defendants due to a lack of scientific evidence alone. In cases where there are no eyewitnesses and the government relies on circumstantial evidence, the observation in Wayne County is consistent with the prior observation in Washtenaw County—jurors are much more likely to acquit if the government's case does not include some scientific evidence. However, it is not appropriate to characterize such acquittals as wrongful, as prosecutors are wont to do when they lose such cases.<sup>6</sup> Researchers have found no evidence of a higher acquittal rate that could be linked to the so-called CSI effect in state courts.<sup>7</sup> Thus, the CSI effect could be more appropriately called the “CSI myth.”

Data in the Washtenaw County and Wayne County studies have demonstrated high expectations and demands for scientific evidence among jurors. Other scholars and researchers have found similarly high expectations and regard for scientific evidence by jurors.<sup>8</sup> If these expectations are the effect, then what are the causes? Contrary to the prosecutor- and media-

promoted idea, the Washtenaw County study data actually ruled out watching CSI or similar programs and showed no causal relationship between jurors' expectations and demands for scientific evidence and television-watching habits.

Subsequently, we refined and extended the analysis of the original data pertaining to circumstantial evidence cases and eyewitness evidence cases, performing a more sophisticated multivariate regression and path analysis and controlling for individual juror characteristics. This new data analysis reinforced the original analysis.<sup>9</sup> Neither the Washtenaw County study data, nor any other studies involving jurors or potential jurors as subjects, have demonstrated a causal relationship between jury verdict behavior and watching CSI or other programs in that genre.<sup>10</sup> The Wayne County study reinforced that conclusion—there is no CSI effect on jury expectations for scientific evidence that influences their verdicts.

That conclusion, however, merely states the negative. If watching CSI-type television programs does not cause juries to acquit defendants in cases without scientific evidence, what could be the cause of the jurors' heightened expectations and demands for scientific evidence? The lack of a correlation between watching CSI and jurors' expectations for scientific evidence does not necessarily mean that watching a plethora of forensic science television shows does not play a role in the juror behavior we have documented. After the Washtenaw County study, we theorized that a “tech effect,” rather than the more specific CSI effect, causes these heightened expectations and demands. This tech effect means that the origins of heightened juror expectations about scientific evidence lie in the broader permeation of the changes in our popular culture brought about by the confluence of rapid advances in science and information technology and the increased use of crime stories as a vehicle to dramatize those advances.<sup>11</sup> The last 30 years have brought about such scientific discoveries and developments that some have justifiably called it a “technology rev-

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6. For example, the Vice-President of the National Association of District Attorneys declared, “Prosecutors are increasingly encountering the ‘CSI Effect’ among jurors even when they have strong cases, with eyewitnesses and confessions by defendants. If they don’t have forensic evidence there have been jurors who will not convict a defendant even if no such evidence was available, and the defendant was caught ‘red-handed.’ When these defendants are found ‘not guilty’ because of the ‘CSI Effect’ and a juror/jurors’ blind faith and belief in the truth of popular forensic crime shows—they are released back into society to continue in their life of crime.” Posting of Joshua K. Marquis (*The CSI Effect—Does It Really Exist?*) to NDAA Talking Justice, <http://communities.justicetalking.org/blogs/day17/archive/2007/10/16/csi-effect-does-it-really-exist.aspx> (Oct. 26, 2007, 15:50 EST) (last visited Nov. 2, 2009).

7. See Cole and Dioso-Villa, *supra* note 1 at 1356–64 (other acquittal rate research cited therein).

8. N. J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction*

*About Forensic Science Affects the Public’s Expectations About Real Forensic Science*, 47 JURIMETRICS J. 357, 363 (2007); Janne A. Holmgren & Heather M. Pringle, *The CSI Effect and the Canadian Jury*, 69 RCMP GAZETTE, Issue No. 2, at 30, 30-31 (available at [www.rcmp-grc.gc.ca/gazette/archiv/vol69n2-eng.pdf](http://www.rcmp-grc.gc.ca/gazette/archiv/vol69n2-eng.pdf)).

9. Young S. Kim, Gregg Barak & Donald E. Shelton, *Examining the CSI-Effect in the Cases of Circumstantial Evidence and Eyewitness Testimony: Multivariate and Path Analyses*, 37 J. CRIM JUST. 452 (2009).

10. Cole and Dioso-Villa, *supra* note 1, at 1371; Kimberlianne Podlas, *The CSI Effect and Other Forensic Fictions*, 27 LOY. L.A. ENT. L. REV. 87, 125 (2007); Kimberlianne Podlas, “*The CSI Effect: Exposing the Media Myth*,” 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 461 (2006); Shelton et al., *supra* note 1, at 367; Kiara Okita, *The CSI Effect: Examining CSI’s Effects upon Public Perceptions of Forensic Science* (Fall 2007) (unpublished M.A. thesis, University of Alberta) (on file with author).

11. Shelton et al., *supra* note 1, at 364.

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olution.” In 2001, a Rand Corporation study concluded that “[b]eyond the agricultural and industrial revolutions of the past, a broad, multidisciplinary technology revolution is changing the world.”<sup>12</sup> These new technologies have been used to

create a further information revolution in the wide availability and quick transmission of information.<sup>13</sup> These developments in science and information are contemporaneous and interrelated. Advancements in science are fostered by the ability to exchange and transfer information, and scientific developments almost immediately become available not only to scientists but also to the entire world.

The information technology system quickly makes scientific discoveries and advancements part of our popular culture. The dissemination of technological developments is fast and widespread through various media, including the Internet, fiction and nonfiction television programs, film, and traditional news sources like television, newspapers, and magazines. Deoxyribonucleic acid (DNA) is a prime example, as it has gone from an abstract concept known only to the small biochemical community to a term that is included in children’s dictionaries.<sup>14</sup> Ordinary people know, or at least think they know, more about science and technology from what they have learned in the media than they ever learned in school.<sup>15</sup> These ordinary people are the jury system, and they come into court filled with years of information and preconceptions about sci-

ence in addition to their beliefs about the criminal adjudication process itself.<sup>16</sup>

Recent research has offered some support for our tech effect hypothesis.<sup>17</sup> Kiara Okita’s detailed regression analysis of 1,200 Canadian citizens’ responses to a random telephone survey “suggest[s] that the ‘tech effect’ posited by Shelton et al. may indeed relate to respondents having learned about forensic science from a larger body of media than *CSI*, one which also includes movies and other fictional television crime dramas,<sup>18</sup> and that this larger ‘effect’ may also be a function of respondents’ social location and particular life experiences.”<sup>19</sup> In the Wayne County study, we tested that tech effect theory and its underlying assumption that jurors’ expectations are a reflection of broader scientific and technological changes in our society.

## SURVEY MATERIALS AND PROCEDURES

Most of the survey questions administered in Wayne County<sup>20</sup> were the same questions that were used in the Washtenaw County study.<sup>21</sup> These questions gathered information about jurors’ television-watching habits,<sup>22</sup> their expectations about whether they would see various types of scientific and other evidence in several criminal trial scenarios,<sup>23</sup> their likely verdict in each of those scenarios depending on whether their expectations were met,<sup>24</sup> and a variety of demographic and victimization-related personal information. However, the Wayne County survey also asked jurors for information that was not requested as part of the Washtenaw County study. Jurors were asked how interested they were in information about crimes and trials and how often they

12. Philip S. Anton, Richard Silbergliitt & James Schneider, *The Global Technology Revolution: Bio/Nano/Materials Trends and Their Synergies with Information by 2015* (2001) (available at [http://www.rand.org/pubs/monograph\\_reports/2005/MR1307.pdf](http://www.rand.org/pubs/monograph_reports/2005/MR1307.pdf)); see also J.R. OKIN, *THE TECHNOLOGY REVOLUTION: THE NOT FOR DUMMIES GUIDE TO THE IMPACT, PERILS, AND PROMISE OF THE INTERNET* (2005); RICHARD SILBERGLITT ET AL., *THE GLOBAL TECHNOLOGY REVOLUTION 2020, IN DEPTH ANALYSES: BIO/NANO/MATERIALS/ INFORMATION TRENDS, DRIVERS, BARRIERS, AND SOCIAL IMPLICATIONS* (2006), (available at [http://www.rand.org/pubs/technical\\_reports/2006/RAND\\_TR303.pdf](http://www.rand.org/pubs/technical_reports/2006/RAND_TR303.pdf)).

13. See MICHAEL L. DERTOUZOS, *THE UNFINISHED REVOLUTION: HUMAN CENTERED COMPUTERS AND WHAT THEY CAN DO FOR US* (2001); Peter F. Drucker, *Beyond the Information Revolution*, *THE ATLANTIC*, Oct. 1999, at 47, 47-57 (available at <http://www.theatlantic.com/doc/199910/information-revolution>).

14. See “D is for DNA,” *LITTLE EXPLORERS ENGLISH PICTURE DICTIONARY*, <http://www.enchantedlearning.com/Disfor.shtml> (last visited Nov. 2, 2009).

15. See, e.g., GLENN REYNOLDS, *AN ARMY OF DAVIDS: HOW MARKETS AND TECHNOLOGY EMPOWER ORDINARY PEOPLE TO BEAT BIG MEDIA, BIG GOVERNMENT, AND OTHER GOLIATHS* (2007).

16. Shelton et al., *supra* note 1, at 362-64 (citations omitted).

17. Okita, *supra* note 10, at 75.

18. *Id.*

19. *Id.* Even more directly, Okita concludes by stating, “I agree with their assertions, and further the argument by contending that forensic science, and by virtue of its content, that *CSI*, may have become emblematic of both the rapid rate of scientific and tech-

nological change our society is continually undergoing, and of a desire for a social certainty of justice that continues to wane.” *Id.* at 106.

20. A copy of the survey is on file with the authors.

21. For a detailed description of the survey questions, see Shelton et al., *supra* note 1, at 340-43.

22. The television program list was revised to reflect current programming differences from the 2006 study.

23. Seven questions posed scenarios of the following types of cases and charges: every criminal case, murder or attempted murder, physical assault of any kind, rape or other criminal sexual conduct, breaking and entering, any theft case, and any crime involving a gun. For each scenario, jurors were asked whether they expected any of the following seven types of evidence: eyewitness testimony from the alleged victim, eyewitness testimony from at least one other witness, circumstantial evidence, scientific evidence of some kind, DNA evidence, fingerprint evidence, and ballistics or other firearms laboratory evidence. The choices for each type of evidence were “yes,” “no,” or “unsure.”

24. Prior to this section, jurors were provided with the reasonable-doubt and burden-of-proof jury instructions used in Michigan. They were then asked how likely they were to find a defendant guilty or not guilty based on certain types of evidence presented in the seven various types of cases. Responses were made on a five-value scale, including “I would find the defendant guilty,” “I would probably find the defendant guilty,” “I am not sure what I would do,” “I would probably find the defendant not guilty,” or “I would find the defendant not guilty.”

obtained criminal justice information from sources ranging from broadcast and print media to movies, television, and Internet sources. They were then asked what crime laboratory resources they thought were available to the local police and when they thought those laboratory resources should be used (i.e., in every criminal case, in every felony case, or only in serious crimes such as murder, rape, or robbery). In the demographics section, additional questions were added to determine whether jurors had various technology devices available to them, including a computer at work or home, a cell phone with or without text messaging or Internet access, cable or satellite television at home, and a global positioning system (GPS) or other electronic navigation device.

The survey was administered during a six-week period to all persons appearing for jury duty on Wednesdays at the facility where state felony trials are conducted in Detroit. A judge advised the jurors that it was for academic research purposes only, that their responses would be anonymous and would not impact their potential selection as jurors in any case, and that participation was entirely voluntary. Of the 1,257 persons appearing for jury duty, 1,219 completed valid surveys.

#### **THE EFFECT OF CSI-WATCHING ON METROPOLITAN JURORS' EXPECTATIONS FOR SCIENTIFIC EVIDENCE ARE HIGH**

Jurors' expectations that the prosecution would present scientific evidence were high in the Wayne County study, exceeding the level of expectations that the data demonstrated in the Washtenaw County study. In Wayne County, 58.3% of the potential jurors expected to see scientific evidence of some kind in every type of criminal case, compared to 46.3% of Washtenaw jurors in our 2006 study. A significant number of jurors (42.1%) expected to see DNA in every case. This was almost double the number of Washtenaw County jurors who reported two years earlier that they expected to see DNA in every case. Approximately half of Wayne County jurors expect to see fingerprint evidence (56.5%) and even ballistics evidence (49.1%) in every criminal case.

Expectations for scientific evidence varied according to the type of crime involved, but still remained very high overall. In murder or attempted murder cases, jurors' expectations for scientific evidence were consistently high as to each of the various scientific evidence categories. Over four out of five Wayne County jurors in a murder or attempted-murder case expect to be presented with scientific evidence of some kind (83.3%), fingerprint evidence (84.5%), and ballistics evidence (83.9%). Almost three-quarters (74.6%) of the Wayne County jurors expected to see DNA evidence in murder cases.<sup>25</sup> In rape cases, the expectations for scientific evidence generally, and DNA evidence in particular, were very high: 83% of the Wayne County jurors were looking for some kind of scientific evidence and 88.9% were expecting to see DNA evidence in a rape case, with only 3.1% saying they did not expect it and 4.8% being "unsure."<sup>26</sup>

25. These responses were considerably higher than those we previously recorded in Washtenaw County where, for example, the expectation for DNA in murder cases was 45.5%. Shelton et al.,

Even in cases involving less serious types of crimes, jurors' expectations for scientific evidence seemed strong. In assault cases not involving murder, attempted murder, or rape, jurors expected scientific evidence of some kind (55%), DNA evidence (48.6%), fingerprint evidence (54%), and ballistics (44.6%). In breaking-and-entering cases, the expectations were scientific evidence of some kind (56.8%), DNA evidence (31.9%), fingerprint evidence (83.8%), and ballistics (28.8%). In any theft case, the expectations were scientific evidence of some kind (45.4%), DNA evidence (24.2%), fingerprint evidence (83.8%), and ballistics evidence (28.8%). In general, the expectation for fingerprint evidence was high for every type of crime that was asked about in the survey.

**Almost three-quarters... of the Wayne County jurors expected to see DNA evidence in murder cases.**

#### **THE RELATIONSHIP OF CSI-WATCHING TO HIGH EXPECTATIONS FOR SCIENTIFIC EVIDENCE**

The data collected in the Washtenaw County study led to the conclusion that these high juror expectations for scientific evidence were unrelated to watching *CSI* or similar shows on television. The study of Wayne County jurors reinforced, and indeed strengthened, that conclusion. A comparison of the impact that watching *CSI* has on the evidentiary expectations of Wayne County and Washtenaw County showed that watching *CSI* affected Wayne County jurors less than it affected Washtenaw County jurors. Thus, the metropolitan jurors seemed to be less affected by the show than the suburban jurors.

Watching *CSI* made a difference in the expectations for 21 of the 49 categories of evidence in the Washtenaw County study, compared to only 13 of the 49 categories in the Wayne County study. For example, watching *CSI* made a significant difference in the expectations of Washtenaw County jurors for scientific evidence in murder and rape cases, while there was no such difference noted in Wayne County jurors. On the other hand, *CSI* watchers in Wayne County were more likely than those in Washtenaw County to expect DNA and fingerprint evidence in assault and breaking-and-entering cases.

#### **DEMANDS FOR SCIENTIFIC EVIDENCE AS A CONDITION OF FINDING GUILT**

If the jurors followed the jury instruction they were given about the presumption of innocence and the burden of proof, the most rational and legally correct response to questions about their probable verdict would be, "I am not sure what I would do," and almost half of the Wayne County jurors gave some form of that response. The other half, however, were willing to give their opinion as to their likely verdict both with and without scientific evidence. The results were similar to those recorded in the Washtenaw County study, and in most

*supra* note 1, at 349.

26. Compared to 72.6% of Washtenaw County jurors who expected to see DNA evidence in rape cases. *Id.*



**[J]urors' increased expectations and demands are more likely the result of the changes in our popular culture...**

cases the jurors still appeared to give considerable weight in the testimony of fact witnesses. In the “every criminal case” category, 28.7% would find the defendant guilty based on eyewitness testimony even without any scientific evidence, compared to 18.8% who said their probable

verdict would be “not guilty” in such a situation.<sup>27</sup> On the other hand, when the prosecution relies on circumstantial evidence, the failure to produce scientific evidence of some kind may be fatal to the government’s case, with 41% of jurors indicating a probable acquittal and only 9.2% indicating a probable guilty verdict.<sup>28</sup> The willingness to rely on factual witnesses did not extend to rape cases, where the jurors appeared to demand scientific evidence as a condition of finding guilt. When the prosecution relies on the rape complainant or other witnesses, but does not present scientific evidence of some kind, more jurors reported that they would find the defendant not guilty (27.1%) than guilty (21.1%). When the prosecutor does not present DNA evidence in a rape case, even more jurors surveyed indicated that they would be more likely to find the defendant not guilty, with 24.8% of the Wayne County jurors indicating a likely verdict of not guilty as opposed to 18.1% indicating a probable guilty verdict.

In other types of cases, a similar pattern of trusting factual witnesses, but demanding scientific evidence where the only other evidence is circumstantial, prevails in the Wayne County study. Even in murder cases where factual witnesses provide testimony, but there is no scientific evidence, 36.8% of the jurors indicated a probable guilty verdict as opposed to 18.2% who indicated a probable not-guilty verdict. In murder cases with factual witnesses, jurors were also less likely to demand DNA evidence, with 38.4% indicating a probable guilty verdict without DNA compared to 12.2% indicating a not-guilty verdict. When the prosecution relies on circumstantial evidence in a murder case and fails to introduce scientific evidence, however, those ratios reversed and 36.1% of the jurors indicated a probable not-guilty verdict as opposed to 12.2% indicating a probable guilty verdict.<sup>29</sup>

**THE RELATIONSHIP OF CSI-WATCHING TO JUROR DEMANDS FOR SCIENTIFIC EVIDENCE AS A REQUISITE FOR CONVICTION**

The more pertinent issue regarding any so-called CSI effect is whether jurors who watch *CSI* are more likely to demand that prosecutors present some scientific evidence before they will find a defendant guilty. The Washtenaw County study data

showed significant differences between *CSI*-watchers and non-*CSI*-watchers in only four of the thirteen different crime scenarios. The data therefore tended to disprove the existence of the *CSI* effect as described by prosecutorial anecdotes. The results in the urban Wayne County study were even more pronounced. In the same 13 scenarios, there were no significant differences in the propensity or reluctance of Wayne County jurors to find a defendant guilty based on whether they watched *CSI*-type programs.

**EXPLORING THE “TECH EFFECT”**

Having ruled out the *CSI* effect, one explanation for the increased expectations and demands for scientific evidence by jurors is the possibility of a broader tech effect. The tech effect suggests that jurors’ increased expectations and demands are more likely the result of the changes in our popular culture brought about by the confluence of rapid advances in science and information technology and the increased use of crime stories as a vehicle to dramatize those advances.<sup>30</sup>

After publication of the 2006 Washtenaw County study, Professor Cole described the article’s suggested tech effect as an interpretation of the *CSI* effect that asserts that “the cause of changes in juror behavior is not *CSI* but rather the real-life technological improvements in forensic science.”<sup>31</sup> Cole’s description is accurate but incomplete. In addition to the actual forensic-science improvements that have occurred, jurors’ perceptions of those increased forensic evidence capabilities, whether they exist in reality or not, also influence jurors’ behavior. Further, even if the forensic science techniques that the jurors envision actually exist, the local police or prosecutors may not always have access to those techniques for budgetary, policy, or other reasons. It is the perceptions of jurors about scientific evidence that represent the real tech effect with which the criminal justice system must come to grips. An important part of that coping process is the realization that the perceptions do not arise from a single television show or even a genre of television shows, but rather from far-reaching changes in our popular culture relating to science and technology.

The tech effect, as Professor Cole accurately concludes, is “not a societal problem.”<sup>32</sup> It is not a problem in the sense that it is inappropriate or wrongful, which is how prosecutors and the media portray the *CSI* effect. It is simply a cultural reality. In other words, the *CSI* effect should not be fodder for the “faulty criminal justice system frame” that sociologist Theodore Sasson describes as competing in the United States for both the public’s and the media’s attention.<sup>33</sup>

The “faulty system frame” argues that crime stems from criminal justice leniency and inefficiency as personified by inadequate DNA laboratories. The policy solutions have called for the criminal justice system to “get tough” and to emphasize

27. Compared to 21% and 16.2%, respectively, in the 2006 Washtenaw study. *Id.* at 354.

28. The Washtenaw results were very similar for circumstantial evidence cases, with guilty and not-guilty verdict percentages at 40.4% and 6.5%, respectively. *Id.*

29. Again, the Washtenaw County jurors followed a similar pattern of probable verdicts in murder cases. *Id.*

30. Shelton et al., *supra* note 1, at 362-65.

31. Cole and Dioso-Villa, *supra* note 1, at 1347 (discussing the “tech effect” proposed in the Washtenaw County study).

32. *Id.* at 1348 (emphasis added).

33. THEODORE SASSON, CRIME TALK: HOW CITIZENS CONSTRUCT A CRIME PROBLEM 13-17 (1995).

the administration of “crime control” rather than the administration of “due process.”<sup>34</sup> As Professor Ray Surette has elaborated, the faulty criminal justice system frame:

[H]olds that crime results from a lack of “law and order.” People commit crimes because they know that they can get away with them because the police are handcuffed by liberal judges. The prisons are revolving doors. The only way to ensure public safety is to increase the swiftness, certainty, and severity of punishment. Loopholes and technicalities that impede the apprehension and imprisonment of offenders must be eliminated, and funding for police, courts, and prisons must be increased. The faulty system frame is symbolically represented by the image of inmates passing through a revolving door of a prison.<sup>35</sup>

Hence, the rising expectations for scientific evidence are not necessarily due to a CSI effect or a faulty criminal justice system exacerbated by unrealistic juror expectations. On the contrary, rising expectations are grounded in a mediated tech effect, which has become part and parcel of our criminal justice culture. The only issue stemming from this reality is whether the criminal justice system will adapt.

#### JUROR FAMILIARITY WITH TECHNOLOGY AND CRIMINAL JUSTICE

Part of the basis for suggesting a tech effect is the idea that jurors have become increasingly technologically sophisticated. They use computers and consumer-level technological gadgets daily and therefore have an appreciation of the power of modern information technology. From this appreciation, jurors develop an expectation that the criminal justice system will exercise that power as well.<sup>36</sup>

The data collected from the Wayne County jurors are clearly reflective of survey data from the general population regarding access and usage of the Internet. Such usage may actually exceed some of the data about this issue obtained only a few years ago. For example, the 2006 Pew Internet Research Project revealed a continually expanding penetration of the Internet into the lives of adult Americans.<sup>37</sup> The Pew study data collected in early 2006 showed that 73% of American adults are Internet users, reflecting an increase from 66% in a Pew study just one year earlier.<sup>38</sup> Almost 87% of the surveyed

Wayne County jurors reported having a computer in their home, and over 40% even have Internet access through their cell phones. Given the increased rate of Internet usage documented in the Pew research, the 87% reflected in the Wayne County study data may simply be a continuation of the strong trends shown over the last several years.<sup>39</sup>

The surveyed jurors also reported using modern information appliances other than home or office computers. The Wayne County jurors’ reported cell-phone usage was consistent with the increased permeation of cell-phone usage that has occurred in the United States.<sup>40</sup> Over 92% of the surveyed jurors have cell phones, compared to the 73% nationally that the Pew Internet Project documented in 2006.<sup>41</sup> In addition, a 2009 Pew study reported that 49% of adult Americans consider their cell phones to be a necessity rather than a “luxury.”<sup>42</sup>

The Wayne County jurors help to demonstrate how technology and its associated gadgets have dramatically changed our culture. As the Pew Internet Project described it, people have an evolving relationship to cyberspace and all of its information:

[A]t a time when accessing online content no longer necessarily means walking over to a weighty beige box and taking a seat. Lighter laptop computers and high-speed networks (wireless and otherwise) give people the opportunity to get digital content on the go and do new things with computing—such as making a phone call. More versatile “smart devices” make emailing, phone calling, and downloading digital content possible with a very portable device. Pictures—photographs and videos—can be created and shared almost instantly, and Web cameras can put people in touch face-to-face over distance in real-time using broadband connections.<sup>43</sup>

While jurors seem to be technologically sophisticated, the question remains: do jurors expect that their local police have,

**[J]urors have become increasingly technologically sophisticated.**

34. RAY SURETTE, *MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES, REALITIES, AND POLICIES* 39 (3d ed. 2007).

35. *Id.*

36. See Donald E. Shelton, *Twenty-First Century Forensic Science Challenges for Trial Judges in Criminal Cases: Where the “Polybutadiene” Meets the “Bitumen,”* 18 WIDNER L.J. 309, 376-77 (2009); Shelton et al., *supra* note 1, at 362-65. See generally Sarah Keturah Deutsch & Gray Cavender, *CSI and Forensic Realism*, 15 J. CRIM. JUST. & POPULAR CULTURE 34 (2008).

37. Mary Madden, *Internet Penetration and Impact* 3 (2006) (available at [http://www.pewinternet.org/~media/Files/Reports/2006/PIP\\_Internet\\_Impact.pdf](http://www.pewinternet.org/~media/Files/Reports/2006/PIP_Internet_Impact.pdf)).

38. *Id.* at 1.

39. *Id.* at 3.

40. A 2007 Harris survey found that almost nine in ten (89%) of

adults have a wireless or cell phone. This represents a significant increase from 77% in October–December 2006 when The Harris Poll conducted a similar analysis; almost eight in ten (79%) adults say that they have a landline phone. This is down slightly from 81% in 2006. *Cell Phone Usage Continues to Increase*, THE HARRIS POLL, April 4, 2008, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=890](http://www.harrisinteractive.com/harris_poll/index.asp?PID=890) (last visited Nov. 2, 2009).

41. John B. Horrigan, *A Typology of Information and Communication Technology Users* 12 (2007) (available at [http://www.pewinternet.org/~media/Files/Reports/2007/PIP\\_ICT\\_Typology.pdf](http://www.pewinternet.org/~media/Files/Reports/2007/PIP_ICT_Typology.pdf)).

42. Paul Taylor et al., *Luxury or Necessity?: The Public Makes a U-Turn* 1 (2009) (available at <http://pewsocialtrends.org/assets/pdf/luxury-or-necessity-2009.pdf>).

43. Horrigan, *supra* note 41, at 1.

**Television is the clearly dominant medium for criminal justice information in popular culture...**

and will use, advanced technological equipment? The Wayne County survey asked jurors whether they thought the police in southeast Michigan have certain crime laboratory testing available to them, including fingerprint comparison, ballistics analysis, hair or fiber analysis, and DNA analysis.

They were also asked in what types of cases (every criminal case, every felony case, or only serious crimes like murder, rape, or robbery) they expected the local police to use those analytical technologies. Overwhelmingly, the Wayne County jurors believe that their local police have the technology available to perform fingerprint, ballistics, hair or fiber, and DNA analysis. For the most part, they expect the police to use that technology in every criminal case. Almost half (45.3%) of the jurors believe the police should use DNA analysis in every case.

The popularity of criminal justice programs and news among the jurors surveyed also demonstrates a curiosity in criminal justice issues. The Wayne County jurors indicated that they have a fairly high interest in getting news about crime and criminal trials. Almost 70% said they were either “very” or “somewhat” interested in getting news about crime and criminal trials. The jurors were asked what sources they use—including radio, newspapers, television, Internet, movies, magazines, and books—to get news about crime and criminal trials and how often they use each source.

The study data showed that print media are not the primary source for news about crime. Television is the clearly dominant medium for criminal justice information in popular culture, with 68.8% of jurors indicating that they used television to get such information regularly, if not often. Adding jurors who said that they used television at least on occasion for criminal justice information increases the cumulative percentage to 89.4%. Nearly half of the jurors in the Wayne County study reported using newspapers at least often and 34% of the jurors used the Internet at least often to get criminal justice information.

Although the jurors primarily rely on television for criminal justice information, that medium has recently undergone significant changes.<sup>44</sup> Access to a multitude of sources through cable television has dramatically changed the availability and

type of information, including information about crimes, trials, and the criminal justice system, in our popular culture. For example, in 2008, more people reported that they obtained their national news from cable television programs than from traditional television broadcast network news programs, although people continued to rely on local broadcast stations for local news.<sup>45</sup> Nationally, 89.1% of American households have cable or satellite television access, while only 10.9% have broadcast only.<sup>46</sup> Wayne County jurors reported information consistent with this trend, with over 85% indicating that they accessed television through cable or satellite.

Social scientists have long understood that characterizations of our criminal justice system in television and other media influence jurors’ perceptions of that system. An early explanation for this influence is the cultivation theory, which communications professor George Gerbner posited over 30 years ago.<sup>47</sup> He theorized that television programs develop or “cultivate” the public’s perceptions of societal reality.<sup>48</sup> Indeed, he regarded television as such a strong force in our society that he believed it was the source of our perceptions of reality. Gerbner found that one strong message that television communicated to the public was about crime and an overestimated likelihood of becoming a victim of crime in a “mean world.”<sup>49</sup>

Gerbner’s view of mediated images of crime and justice has been expanded and developed over the past 30 years.<sup>50</sup> The modern issue with the originally framed cultivation theory as a means of explaining the impact of popular culture on individual perceptions of reality is that it is technologically outdated.<sup>51</sup> Although television still may be the most important source of criminal justice information, it no longer has the overwhelming media impact on our culture today that it did when Gerbner made his observations. Thirty years has turned out to be an enormous amount of time technologically, as there are many more types of media sources now than there were then.

Television itself has changed dramatically, particularly in the variety of its offerings. But that does not necessarily mean that Gerbner’s conception of the impact of mass media, and television in particular, on perceptions of the criminal justice system is no longer valid. The range of sources of mass media in general, and the range of television sources in particular, is much broader and diverse than when Gerbner formulated the cultivation theory. But it remains true that portrayals of crime and criminal justice on television impact the perception of law and,

44. Taylor, *supra* note 42.

45. Press Release, Pew Research Ctr. for the People & the Press, *Audience Segments in a Changing News Environment* 13 (Aug. 17, 2008), available at <http://people-press.org/reports/pdf/444.pdf>.

46. *Household TV Trends Holding Steady: Nielsen’s Economic Study 2008*, NIELSEN, Feb. 24, 2009, [http://blog.nielsen.com/nielsenwire/media\\_entertainment/household-tv-trends-holding-steady-nielsen%E2%80%99s-economic-study-2008/](http://blog.nielsen.com/nielsenwire/media_entertainment/household-tv-trends-holding-steady-nielsen%E2%80%99s-economic-study-2008/) (last visited Nov. 22, 2009).

47. George Gerbner et al., *Growing Up with Television: Cultivation Processes*, in *MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH*

43, 43-44 (Jennings Bryant & Dolf Zillmann eds., 2d ed. 2002); George Gerbner & Larry Gross, *Living with Television: The Violence Profile*, 26 J. COMM. 173, 191 (1976) (available at <http://www.unf.edu/~pharwood/courses/fall05/3075fall05/crimegerbner.pdf>).

48. Gerbner & Gross, *supra* note 47, at 191.

49. *Id.* at 193.

50. See KATHERINE MILLER, *COMMUNICATION THEORIES: PERSPECTIVES, PROCESSES, AND CONTEXTS* (2d ed. 2005).

51. See Podlas, *Exposing the Media Myth*, *supra* note 10.

in particular, criminal justice in our popular culture.<sup>52</sup> Today, however, the medium of television is one of many more conveyance mechanisms for the messages about crime and criminal justice we receive from the media. Television, while still a dominant media source, is no longer the monopolizing or overpowering media influence in our society that it once was.<sup>53</sup>

The diversity of sources does not necessarily mean that there is a concomitant diversity of themes about criminal justice that those media sources portray. The message that Gerbner saw in the media about crime and the “mean world” is still conveyed, but perhaps now by a much broader and diverse array of media sources, including a more diverse television medium itself. Cultivation theory is still valid, but this theory now applies to a greater diversity or multiplicity of media, including television. More importantly to the issue of demands for forensic evidence, the same limited “faulty justice” frame of Sasson still appears to be a dominant theme or message found in each and all of the media.

### **CORRELATING THE TECH EFFECT TO JUROR EXPECTATIONS FOR SCIENTIFIC EVIDENCE**

To examine the tech effect, the Wayne County study assumed that modern technological advances would be reflected in personal familiarity with the use of technology and in various popular media, including television, radio, newspaper, or the Internet. The study also assumed that those who use technology regularly or are frequently exposed to popular media would be more aware of the technological and scientific developments in forensics.

The jurors’ exposure to various criminal television programs showed significant relationships with their expectations for scientific evidence. In “every criminal case,” for example, jurors who frequently watched various criminal justice programs were significantly more likely to expect testimony from the victim, circumstantial evidence, some kind of scientific evidence, DNA, fingerprint, and ballistic evidence than jurors who watched less frequently. In general, exposure to criminal justice programs was significantly related to the expectations in many evidence and offense scenarios.

On the other hand, juror exposure to a variety of media sources showed considerably fewer significant relationships with expectations. In the “every criminal case” category, exposure to various media sources for information about recent crimes was significantly related to the expectations for testi-

mony from the victim, fingerprint, DNA, and ballistic evidence. Interestingly, however, media exposure showed no significant relationship with expectations for any evidence in the cases of physical assault, rape, or theft.

Juror access to and familiarity with technology devices produced findings in between the other two tech effect measures. This highest level of technology usage had a significant relationship to evidentiary expectations in almost half of the scenarios. The jurors with cell-phone Internet access, for example, had significant expectations that they would see some form of scientific evidence in six of the seven crime categories.

Jurors’ exposure to *CSI* or similar dramas showed a significant relationship with their expectation in less than a fourth of the scenarios. As the suburban Washtenaw County study showed in 2006, jurors who watched *CSI*-type dramas more frequently were more likely to expect traditional forms of evidence, such as victim testimony or eyewitness testimony, rather than just strictly scientific evidence, such as fingerprints, ballistics, or DNA. They expected victim testimony in every criminal case, every rape case, and every gun case, and victim testimony and eyewitness testimony in murder or attempted murder cases. They also expected DNA and fingerprint evidence in physical assault and theft cases.

### **“MASS MEDIATED EFFECTS” ON ATTITUDES, BEHAVIOR, AND EXPECTATIONS**

Most contemporary scholars of mass media accept the reality that both factual and fictional narratives help to shape the beliefs, values, thoughts, and actions of the general public.<sup>54</sup> In fact, the dominant perspective within contemporary studies of crime, justice, and mass media is that of social constructionism—the belief that reality is not only composed of objective and empirically based knowledge, but also of information that we acquire from social interactions of all kinds. Social constructionism has also adopted the commingling or blurring of factual and fictional accounts as fundamental in shaping what the public comes to regard as crime and justice.<sup>55</sup> When it comes to the mass media’s effects on the public’s notions of

**[B]oth factual and fictional narratives help to shape the beliefs... of the general public.**

52. See Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229, 229-35 (1987); Steven Keslowitz, *Note, The Simpsons, 24, and the Law: How Homer Simpson and Jack Bauer Influence Congressional Lawmaking and Judicial Reasoning*, 29 CARDOZO L. REV. 2787, 2787-98 (2007).

53. See John Dimmick, Yan Chen & Zhan Li, *Competition Between the Internet and Traditional News Media: The Gratification-Opportunities Niche Dimension*, 17 J. MEDIA ECON. 19, 27 (2004) (“[T]he Internet has a competitive displacement effect on traditional media in the daily news domain with the largest displacements occurring for television and newspapers.”); Press Release, Pew Research Ctr. for the People & the Press, *Social Networking*

*and Online Ideas Take Off* 4 (Jan. 11, 2008) (available at <http://people-press.org/reports/pdf/384.pdf>) (indicating that the number of people who get political information from the Internet, as opposed to television, almost doubled between 2004 and 2008).

54. See, e.g., DORIS A. GRABER, *MASS MEDIA AND AMERICAN POLITICS* (7th ed. 2006).

55. See generally VICTOR E. KAPPELER ET AL., *THE MYTHOLOGY OF CRIME AND CRIMINAL JUSTICE* (1993) (“Myths tend to organize our views of crime, criminals, and the proper operation of the criminal justice system”); MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME: *STUDIES IN NEWSMAKING CRIMINOLOGY* (Gregg Barak ed., 1994) (analyzing how media coverage has shaped Americans’ conception of crime and criminal justice); Surette, *supra* note 34.

**[T]here is no factual basis for the strong prosecutor version of the CSI effect...**

social reality, there are four models that explain these effects: (1) the hypodermic needle model,<sup>56</sup> (2) the limited effects model,<sup>57</sup> (3) the minimal effects model, and (4) the indirect-effects model.<sup>58</sup>

The hypodermic needle model, as the term suggests, assumes that the mass media

has a direct and significant effect on the way people perceive social reality.<sup>59</sup> When it comes to the administration of justice in general, or to the trial and adjudication of criminal defendants in particular, this is the most superficial model of the four. Even if it could apply to some aspects of people's views on crime and justice, it has no application in determining the outcome of a criminal verdict.

At the other end of a media-effects continuum is the limited effects model, which argues that, while individuals turn to mass media for information, they do so not as a *tabula rasa* but rather as people who have experience and knowledge from other sources, such as family, school, and friends.<sup>60</sup> As Professor Surette maintains, people possess a social reality that consists of both their "experienced reality" and their shared "symbolic reality."<sup>61</sup> As a result, the idea that all viewers of CSI-type programs would take away the same lessons is an absurd or untenable proposition to most media theorists.

Somewhere in the middle of the continuum is the minimal effects model, which argues that media effects are neither direct or total nor insignificant or inconsequential.<sup>62</sup> From this perspective, media effects are more general in the sense that they help to establish agendas by telling us what we should be thinking about or what the important issues of the day are.<sup>63</sup> Media effects also help us to frame discussions either thematically, using data, trends, and context; episodically, using anecdotal, individual, and superficial stories; or both.

The fourth perspective, or the indirect-effects model, rejects the hypodermic needle model.<sup>64</sup> While the indirect-effects model could be located on the continuum between the limited and minimal effects models, it also shares some things in common with each of these models. As Professor Barak has previously argued, whether one is studying the interactions between law and order, crime and justice, or violence and nonviolence, one should simultaneously study the social construction of these phenomena as they are mediated through mass communications and popular culture.<sup>65</sup> For example, understanding the construction of newsmaking criminology requires an

examination of the conscious and unconscious processes involved in the mass dissemination of symbolic consumer goods. To explain juror responses to forensic evidence issues in criminal cases, we suggest such an indirect-effects model of mediated adjudication and turn to that model in the concluding section of this article.

## **CONCLUSION: EXPECTATIONS AND AN INDIRECT-EFFECTS MODEL OF MEDIATED ADJUDICATION**

The 2006 Washtenaw County study and the 2009 Wayne County study clearly demonstrate that jurors very much expect to see scientific evidence in criminal trials. These high expectations result in large part from what we have described as the tech effect, or public awareness of and familiarity with the powers of modern technology, coupled with their awareness of the availability of that technology, as an important part of the criminal adjudication process. This awareness comes from a variety of sources, especially from mass media, including television with its expanded offerings. CSI-type programs are a part of that media environment, but they do not play the significant role in forging jurors' expectations that many have attributed to them.

Expectations are one thing, but demands are another. The Wayne County study data also demonstrates that even though these expectations do not originate in watching CSI-type programs, they also do not necessarily result in corresponding jury verdicts. At the very least, there is no factual basis for the strong prosecutor version of the CSI effect, which claims that watching CSI programs causes jurors to wrongfully acquit defendants; thus, the CSI effect is a myth. The tech effect, on the other hand, is created by the mass media far beyond the CSI genre; however, it still cannot be singled out as the sole causative link to jury verdicts, either for convictions or acquittals. The process by which jurors deliberate on criminal allegations is far too complex and the impact of the media generally on those outcomes is far too diverse to lie at the foot of any one particular cause. Instead, with respect to the importance of scientific evidence, there is a multifaceted media impact on juror verdicts. We therefore propose an indirect-effects model of this mediated adjudication process.

An indirect-effects model of mediated adjudication does not assume a direct or linear cause-effect relationship between criminal trial outcomes and any other variables—including the CSI effect, the tech effect, and the mass media effect. Nor does this model assume that guilty versus not guilty verdicts can be correlated with selected variables capable of discerning, let alone predicting, the behavior of juries, judges, or attorneys.

56. ROY EDWARD LOTZ, CRIME AND THE AMERICAN PRESS (1991).

57. SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION (1987).

58. *Id.*

59. LOTZ, *supra* note 56, at 40-41.

60. See generally IYENGAR & KINDER, *supra* note 57.

61. SURETTE, *supra* note 34, at 33-34.

62. IYENGAR & KINDER, *supra* note 57.

63. See Simon Cottle, *Mediatizing the Global War on Terror: Television's Public Eye*, in MEDIA, TERRORISM, AND THEORY: A READER

(Anandam P. Kavoori & Todd Fraley eds., 2006).

64. GREGG BARAK, VIOLENCE AND NONVIOLENCE: PATHWAYS TO UNDERSTANDING 189 (2003).

65. *Id.* at 175; MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME, *supra* note 55, at xi-xv; Gregg Barak, *Mediatizing Law and Order: Applying Cottle's Architecture of Communicative Frames to the Social Construction of Crime and Justice*, 3 CRIME, MEDIA, CULTURE 101, 101-02 (2007); Gregg Barak, *Newsmaking Criminology: Reflections on the Media, Intellectuals, and Crime*, 5 JUST Q. 565, 565-66 (1988).



Rather, an indirect-effects model assumes a reciprocal system of mutually influencing factors where behavioral outcomes are not overly determined, but may vary considerably, especially in relation to the complexity of the criminal case. In other words, a CSI effect, a tech effect, or a mass media effect, alone or in combination, represents some of the more conspicuous social features that may, in interaction with a variety of other cultural and individual factors, affect the outcomes of criminal adjudication.

Thus far, this article has defined the CSI effect and the tech effect, and we have subjected these to a variety of empirical examinations, including path and multivariate analyses, but we have yet to define or test for mass media or media effects. Of course, when we examine a specific dramatic series like *CSI*, more general media sources like radio, films, newspapers, the Internet, or various criminal justice-related television programming, what we are actually examining are the various groups of mass communication or what may collectively be referred to as mediatised effects.<sup>66</sup>

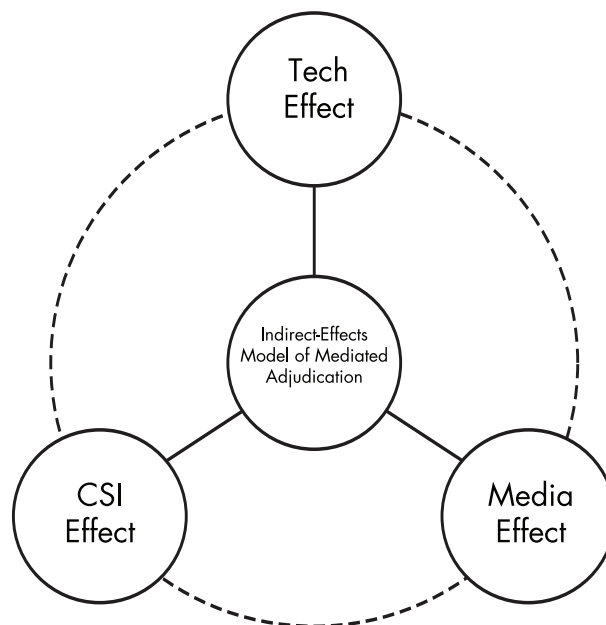
At the same time, media effects also refer to the increasing ubiquity and complexity by which the material and virtual realities of crime and justice are mediated throughout evolving technologies and mass culture. In a sense, then, we have also tested media effects indirectly when we tested for the CSI effect and the tech effect. While the data from the Washtenaw County study and Wayne County study have indicated the absence of a CSI effect on juror decision making and shown mixed and overlapping support for a combination of technological permeation and criminal-justice-related television viewing, any effect whatsoever is proof of a “mass mediated effect.” Thus, in terms of the indirect-effects model, we assume media effects as a given or a constant, and at the same time conceive of media effects as having their own sphere in a triangulated relation for the mythical CSI effect and the tech effect as depicted in the accompanying figure.

With respect to the two spheres of the indirect-effects model for which we directly tested (the CSI effect and tech effect), the Wayne County study data revealed that, while there was a significant increase in the expectations for the presentation of scientific evidence by those jurors exposed to various criminal-justice-related television programs, a much smaller increase for those exposed to *CSI*-type dramatic programs, and an even smaller increase for those exposed to various media sources, those expectations alone did not necessarily result in juror demands for scientific evidence as a prerequisite for a guilty verdict. In short, when it comes to juror behavior and the acquittal or conviction of criminal defendants, the CSI effect is,

in fact, a myth. However, like many other myths circulating throughout the criminal justice system and society in general, the myth may have real consequences.<sup>67</sup>

Prosecutors, judges, defense lawyers, and other law enforcement actors firmly believe in the “strong prosecutor” version of the CSI myth, so much so that they themselves, in collaboration with the news media, manufactured the CSI effect.<sup>68</sup> Survey research of prosecutors, defense attorney, and judges demonstrates that 79% of these legal actors perceive that the

### Relationships Within the Indirect-Effects Model



CSI effect is real and that forensic-based television programs have influenced jury decisions.<sup>69</sup> Similarly, research has also demonstrated that, either based on their own perceptions of jurors’ alleged behavior or by actually watching these shows for themselves, prosecutors and defense attorneys have altered their own behaviors during evidentiary evaluations, voir dire, opening and closing statements, and cross-examination of expert witnesses, among others.<sup>70</sup> This has led prosecutors to introduce “negative evidence”<sup>71</sup> to suggest to jurors that the public taxpayers cannot afford to perform scientific tests,<sup>72</sup> or to ask the judge to instruct jurors that the production of scientific evidence is not necessarily part of the government’s burden of proof.<sup>73</sup> Thus, the myth of the CSI effect turns into

66. CRIME AND MEDIA: A READER 5-8 (Chris Greer ed., 2009).

67. See *Demystifying Crime and Criminal Justice* (Robert M. Bohm & Jeffery T. Walker eds., 2006) (discussing several myths related to crime); HAROLD E. PEPINSKY & PAUL JESILOW, MYTHS THAT CAUSE CRIME (1984) (listing several myths related to crime and their implications).

68. See generally Maricopa County Attorney’s Office, *CSI: MARICOPA COUNTY: THE CSI EFFECT AND ITS REAL-LIFE IMPACT ON JUSTICE* (2005) (noting the influence on jurors of *CSI*-type programs); Marquis, *supra* note 6; Thomas, *supra*, note 2.

69. Monica L. P. Robbers, *Blinded by Science: The Social Construction of Reality in Forensic Television Shows and Its Effect on Criminal Jury Trials*, 19 CRIM. JUST. POL’Y REV. 84, 91 (2008).

70. See Shelton, *supra* note 36.

71. See *id.* at 378-81.

72. See, e.g., *People v. Compean*, No. A111367, 2007 WL 1567603, at \*8 (Cal. Ct. App. May 31, 2007).

73. *United States v. Saldarriaga*, 204 F.3d 50, 52-53 (2d Cir. 2000); see *United States v. Mason*, 954 F.2d 219, 221 (4th Cir. 1992); *Evans v. State*, 922 A.2d 620, 632-33 (Md. Ct. Spec. App. 2007).

a reality for the jurors at least insofar as it is reflected in the reactive conduct of the trial actors.

Finally, in terms of an indirect-effects model of mediated adjudication, the same research has supported a weak, rather than a strong, prosecutor effect. Hence, legal actors' belief in the CSI myth has had real consequences and, in all likelihood, will continue to do so, regardless of whether these actors learn that the CSI effect on jurors' decision making is actually a myth. This is the case because it is not any one of the mediated effects—CSI, tech, or mass media—acting alone that is the actual cause, but rather some kind of relationship as illustrated in the figure of our model.

This leads to practical research and conceptual issues alike. For example, one problem with the type of analyses that lay the blame on one “legal actor”—such as defense attorneys, prosecutors, judges, or juries in our case studies—is that the analyses become overly determined by only one of four legal actors that make up the adversarial system, when the legally adjudicated outcome-reality is always the result of the four legal actors interacting. Similarly, it is important that, when examining the impact of other social forces (e.g., mass media, CSI, technology), analysts should do so with the understanding that these effects interact with each other, as well as with other variables such as class, race, gender, education, and so on. Lastly, when conceptualizing these interacting relationships, the Indirect-Effects Model of Mediated Adjudication is one viable way of conceptualizing these interacting relationships.



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# Should Judges Worry About the “CSI Effect”?

Simon A. Cole & Rachel Dioso-Villa

These days it still seems like everyone is talking about the “CSI effect.” Attorneys seem to talk about it all the time. The 258 different articles using the term between 2002 and 2008 that we found through a LexisNexis search are undoubtedly only the tip of the iceberg of media mentions of this supposed phenomenon. Even academics are writing about it—already a handful of books, several dissertations in progress, and numerous scholarly journal articles detail the topic.

Judges are no exception to this phenomenon. A recent survey shows that most judges believe the television program *Crime Scene Investigation* (CSI) has increased jurors’ expectations for forensic evidence, and many judges believe CSI has made it more difficult to convict defendants.<sup>1</sup> In an analysis of 318 newspaper and magazine articles discussing the CSI effect, 27 (8.5%) quoted a judge.<sup>2</sup> Justice Scalia mentioned the phenomenon in an opinion.<sup>3</sup> Judge Harry Edwards, Chief Judge Emeritus of the D.C. Circuit Court of Appeals and Co-Chair of a recent National Research Council (NRC) Committee on improving forensic science, has mentioned the phenomenon a number of times in his speeches about the committee’s work.<sup>4</sup> One member of one of the most prominent teams of scholars doing empirical research on the CSI effect is a state court judge: Donald Shelton, Chief Judge of the Washtenaw County Trial Court in Michigan.<sup>5</sup> Allegheny County, Pennsylvania Common Pleas Judge John Zottola says, “Jurors’ expectations of criminal prosecutions have been altered by these shows.”<sup>6</sup> Lansing Hayes, a Kootenai County, Washington 1st District Court Judge, says jurors expect crime scenes to be “dripping with forensic evidence.”<sup>7</sup> Chicago Criminal Court Judge Michael Toomin says the CSI effect “is definitely out there.”<sup>8</sup> Others, like Prince George’s County, Maryland Judge James

Lombardi, call claims of a CSI effect “myths.”<sup>9</sup> As one judge summed it up:

[T]his Judge in a number of trials in the last several years or so has witnessed defendants increasingly . . . taking advantage of [the CSI effect] by asking witnesses about tests they know were not conducted and contending in closing argument that the failure to test raises reasonable doubt. They are taking appropriate advantage of a different kind of proof expectations with which some jurors come into the courthouse in the last several years as a result of these programs. It would be naïve not to recognize and acknowledge all of this. This does not mean the Court finds that there is a CSI Effect but, in fact, it means that there is enough of a possibility of it that it cannot be ignored.<sup>10</sup>

These are serious concerns. If they are true, they raise serious doubts about courts’ ability to administer justice fairly. Judges, in their dual roles as producers of trials and administrators of courts, would be the individuals expected to take countermeasures to remediate the problem. These countermeasures, however, would be serious indeed, and, in some cases, might even challenge cherished practices of the American system of trial by jury. Judges might, understandably, be inclined to alter these practices only with great caution.

A look at some of the popular and scholarly literature would seem to suggest that judges should start taking action immediately. Media coverage shows remarkably little equivocation about the existence of the CSI effect. Media reports declare that “[t]here is no debating” the reality of the CSI effect,<sup>11</sup> and that “[t]he story lines are fiction. Their effect is real.”<sup>12</sup> It is said

\* This article is adapted from Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 NEW ENG. L. REV. 435 (2007), and Simon A. Cole & Rachel Dioso-Villa, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335 (2009). We are grateful to Michael Risinger, Nancy Marder, and William Thompson for discussing with us various issues implicated in this article.

## Footnotes

1. Thomas Hughes & Megan Magers, *The Perceived Impact of Crime Scene Investigation Shows on the Administration of Justice*, 14 J. CRIM. JUST. & POP. CULT. 259 (2007).
2. This analysis will be published in a forthcoming article.
3. *Kansas v. Marsh*, 126 S. Ct. 2516, 2529-2539 (U.S. 2006) (Scalia, J., concurring).
4. See Harry T. Edwards, Address at Conference on Forensic Science for the 21st Century at Arizona State University: Solving the Problems that Plague the Forensic Science Community (Apr. 3); Harry T. Edwards, *The National Academies of Sciences Report on Forensic Sciences: What It Means for the Bench and the Bar*, JURIMETRICS J. (2010).
5. Donald E. Shelton, *Twenty-First Century Forensic Science*

*Challenges for Trial Judges in Criminal Cases: Where the “Polybutadiene” Meets the “Bitumen,”* 18 WIDENER L.J. 309 (2009); Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist*, 9 VAND. J. ENT. & TECH. L. 331 (2006); Donald E. Shelton et al., *An Indirect-Effects Model of Mediated Adjudication: The CSI Myth, the Tech Effect, and Metropolitan Jurors’ Expectations for Scientific Evidence*, 12 VAND. J. ENT. & TECH. L. 1 (2009).

6. Maggi Newhouse, *Real-life investigators indict “CSI” for perjury*, PITTSBURGH TRIB.-REV., Apr. 13, 2005.
7. Jody Lawrence-Turner, *Popular Shows May Sway Jurors*, SPOKANE SPOKESMAN REV., Jan. 27, 2008.
8. Ed Treleven, *The “CSI Effect” on Real Juries*, WIS. ST. J., June 19, 2005.
9. Flynn McRoberts et al., *Fact or Fiction? The Jury Is Still out on the CSI Effect*, CHI. TRIB., June 5, 2005, at C3.
10. *State v. Cooke*, 914 A.2d 1078, 1088 (Del. Super. Ct. 2007).
11. Linda Deutsch, *“CSI” and “Law & Order” Lead Jurors to Great Expectations*, ASSOCIATED PRESS, Jan. 14, 2006.
12. Glenn E. Rice, *CSI: Courtroom Stalemate Increase*, KAN. CITY STAR, Aug. 10, 2005.

that “TV is driving jury verdicts all across America,”<sup>13</sup> that “TV’s False Reality Fools Jurors,”<sup>14</sup> and that “CSI Has ‘Major Effect’ on Real Life Juries.”<sup>15</sup> An online journal claims that “[i]n many cases across the nation real-life jurors who are fans of CSI has [sic] either caused hung juries or acquitted obviously guilty criminals, claiming the investigators failed to test evidence the way CSI does on television.”<sup>16</sup> A jury consultant says that “[t]he CSI effect is real, and it’s profound.”<sup>17</sup> The accusations leveled at CSI border on charges of jury tampering: one forensic scientist says that CSI is “polluting jury pools.”<sup>18</sup> The impact of CSI is portrayed as irresistible: a prosecutor adds, “Jurors are so influenced by television . . . that it makes it nearly impossible for us . . .”<sup>19</sup>

Not only is the media treating the CSI effect as a serious problem, but justice system actors are as well. The FBI has produced a video about it.<sup>20</sup> The Maricopa County Attorney (the presiding prosecutor over much of the major metropolitan area surrounding the city of Phoenix, Arizona) has declared that CSI has a “real-life impact on justice” and has called on CBS to insert a disclaimer on the program stating that it is fiction.<sup>21</sup> In addition to concerns about the integrity of the jury system, some prosecutors have claimed that the CSI effect has altered another pillar of the criminal trial—the standard of proof. They have claimed that jurors are now holding them to a *higher* standard of proof than the traditional “beyond a reasonable doubt” standard. In closing arguments, prosecutors have called this higher standard the “TV expectation.”<sup>22</sup> Several legal scholars have noted that, while the notion that forensically oriented television programs might influence jurors is theoretically plausible, there is, as yet, no convincing evidence of such an effect.<sup>23</sup> Legal scholars have further noted that, from a theoretical point of view, any media influence on juries would be equally likely to have an effect opposite to that most commonly discussed by the media—that is, forensically oriented television programming might just as easily make juries more conviction prone as more acquittal prone.<sup>24</sup> Legal scholars have also noted that even if media *influences* jurors, that by no means necessarily trans-

lates into changed verdicts.<sup>25</sup> They have also noted that no increase in reported jury acquittals has been detected.<sup>26</sup> Amidst this uncertainty, what should judges do? Should they keep calm and risk seeming complacent, or should they leap into action and risk changing longstanding judicial practices in response to what may in retrospect turn out to have been little more than media hype?

To help judges decide how to cope with this emerging challenge, this article seeks to provide a sober assessment of both the CSI effect and what we know about it. It will begin by seeking to define the CSI effect. It will show that media reports use this single term to describe at least six distinct phenomena. Some of these phenomena would, if true, clearly be damaging to the delivery of justice; but for others the damage is less obvious. We will suggest that we need to carefully distinguish which of these several “effects” we are discussing when we talk about the CSI effect, whether it is “real,” and what to do about it.

Next, we will discuss the empirical evidence that currently exists concerning the CSI effect, paying close attention to which of the several aforementioned “effects” the evidence supports. Given that the empirical support for the CSI effect, as commonly understood, is fairly weak, we will then discuss several alternative explanations for why attorneys, the media, and even academics seem so eager to ascribe “reality” to this phenomenon. Finally, we will discuss several ways in which judges might be expected to try to control or correct for this CSI effect: voir dire, summation, presentation of “negative evidence,” and the administration of the courts.

## I. WHAT IS THE CSI EFFECT?

The term CSI effect appears to have entered the popular lexicon late in 2002 in an article in *Time* magazine.<sup>27</sup> That article described “a growing public expectation that police labs can do

**A jury consultant says that “[t]he CSI effect is real, and it’s profound.”**

13. Kit R. Roane & Dan Morrison, *The CSI Effect*, 138 U.S. NEWS & WORLD REP. 49, Apr. 17, 2005.

14. Kate Coscarelli, *The “CSI” Effect: TV’s False Reality Fools Jurors*, NEWHOUSE NEWS SERV., Apr. 21, 2005.

15. *CSI Has “Major Effect” on Real Life Juries*, CBS4 DENV. (May 5, 2005).

16. Clarence Walker, *CSI (T.V. Crime Dramas) Affects the American Criminal Justice System* (June 2005), available at [http://www.americanmafia.com/Feature\\_Articles\\_301.html](http://www.americanmafia.com/Feature_Articles_301.html)

17. Amy Lennard Goehner et al., *Where CSI Meets Real Law and Order: Ripple Effect*, TIME, Nov. 8, 2004, at 69.

18. Allison Klein, *Art Trips Up Life: TV Crime Shows Influence Jurors*, BALTIMORE SUN, July 25, 2004, at 1A.

19. *Id.* (quoting Baltimore Deputy State Attorney Haven H. Kodeck) (internal quotation marks omitted).

20. DVD: CSI Effect Fact or Fiction (Tom Christianberry, CSI Effect Fact or Fiction, FBI Training Network, DVD video).

21. Maricopa County Attorney’s Office, *CSI: MARICOPA COUNTY: THE CSI EFFECT AND ITS REAL-LIFE IMPACT ON JUSTICE* (June 30, 2005), available at <http://www.maricopacountyattorney.org/Press/PDF/CSIReport.pdf>

22. *Boatswain v. State*, No. 408,2004, 2005 WL 1000565, at \*2 (Del. Apr. 27, 2005) (internal citation omitted); cf. Robin Franzen, *TV’s “CSI” Crime Drama Makes It Look Too Easy*, OREGONIAN, Dec. 10, 2002, at A1.

23. See Kimberlianne Podlas, “The CSI Effect: Exposing the Media Myth,” 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429 (2006); Shelton et al., *Juror Expectations*, *supra* note 5; Tom Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L. J. 1050 (2006).

24. See Podlas, *supra* note 23; Tyler, *supra* note 23.

25. See, e.g., Kiara Okita, *The CSI Effect: Examining CSI’s Effects upon Public Perceptions of Forensic Science* (2007) (Master’s thesis, University of Alberta).

26. See Charles Loeffler, “CSI” and the Criminal Justice System: *Jury Trials*, NEW REPUBLIC, June 7, 2006 (available at <http://www.tnr.com/doc.mhtml?i=w060605&s=loeffler060706>); Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 NEW ENG. L. REV. 435 (2007).

27. Jeffrey Kluger et al., *How Science Solves Crimes*, TIME Oct. 21, 2002, at 36.

everything TV labs can.”<sup>28</sup> Even in this early article, the notion of jury taint was present: “This [expectation, forensic scientists] worry, may poison jury pools . . . .”<sup>29</sup> The term appeared a couple of times the following year and more in 2004. In 2005, media coverage of the CSI effect exploded. A LexisNexis search found 56 newspaper and magazine articles mentioning the CSI effect in that year and 78 articles in 2006, the peak year. This coverage included a cover story in *U.S. News & World Report*,<sup>30</sup> as well as coverage in leading science magazines like *National Geographic* and *Scientific American*.<sup>31</sup> Also in 2006, the first full-length book devoted to the CSI effect appeared.<sup>32</sup>

## II. A TYPOLOGY OF CSI EFFECTS

The media and its sources use the term CSI effect loosely to denote a remarkable variety of different purported effects.<sup>33</sup> In our earlier work, we proposed a typology of six different specific causal claims that we discerned in the media coverage of the CSI effect, each named for the type of social actor who tended to articulate the supposed effect. Table 1 summarizes each effect. The perhaps canonical effect, which we dubbed the “strong prosecutor’s effect,” is the claim that television programming is altering juror behavior. Specifically, it is frequently claimed that *CSI* has increased juror expectations for forensic evidence in criminal trials. Because of *CSI*, jurors supposedly expect to see forensic evidence more often and expect it to be more probative. This, in turn, could lead to acquittals in cases where forensic evidence is absent or insufficiently probative. In other words, it is suggested that jurors are acquitting in cases lacking forensic evidence in which they would have convicted but for the creation of *CSI* and similar television programs.

Many prosecutors also make a weaker claim, which we called the “weak prosecutor’s effect.” This claim posits that *CSI* has altered prosecutor, not juror, behavior. Claimed changes in prosecutorial behavior include questioning potential jurors about their television-viewing habits in voir dire, presenting negative-evidence testimony, discussing *CSI* in summations, and requesting legally unnecessary forensic tests.<sup>34</sup>

Some defense attorneys advance an opposite effect, which we called the “defendant’s effect.” The claim is that *CSI* and similar television programming, through their positive and heroic portrayals of state-employed forensic scientists, enhance the perceived credibility of the government’s forensic

witnesses, thus advantaging the prosecution.

The producers of *CSI*, in rebutting charges that their product is contaminating the criminal justice system, appropriated the term CSI effect and reinterpreted it as an educational effect on the general public. What we called the “producer’s effect” holds that *CSI* teaches science to the American viewing public.

The “educator’s effect,” in contrast, claims that *CSI* is attracting young people into careers in forensic science, much as law programs, such as *L.A. Law*, have been thought to increase law-school applications;<sup>35</sup> medical programs, such as *E.R.*, have been thought to influence medical students’ choice of specialty<sup>36</sup> (and perhaps medical-school applications as well); and the book and film *The Silence of the Lambs* has generated countless, mostly unfulfillable dreams of careers in forensic profiling.<sup>37</sup>

Finally, some media sources posit the “police chief’s effect.” This claim holds that *CSI* has educated criminals on how to avoid detection. Examples of the supposed police chief’s effect include wearing gloves and dousing crime scenes with bleach.<sup>38</sup>

It is important to emphasize that, of these six effects, only three of them—the strong prosecutor’s effect, the defendant’s

**TABLE 1. THE MANY EFFECTS OF CSI: TYPOLOGY OF CSI EFFECTS FOUND IN MEDIA ACCOUNTS**

EFFECT NAME	EFFECT ON	DESCRIPTION
Strong prosecutor’s effect	Jurors	Acquit in cases in which they would have convicted had <i>CSI</i> never existed
Weak prosecutor’s effect	Prosecutors	Compensate for absence/weakness of forensic evidence
Defendant’s effect	Jurors	Afford greater credibility to forensic expert witnesses
Producer’s effect	Jurors	Know more science
Educator’s effect	Students	Attraction to careers in forensic science
Police chief’s effect	Criminals	Adopt countermeasures to prevent detection through forensic evidence

28. *Id.*

29. *Id.*

30. Roane & Morrison, *supra* note 13.

31. Max M. Houck, *CSI: Reality*, *Sci. Am.*, July 26, 2006, at 84, 85; Stefan Lovgren, ‘CSI’ Science Eluding Real-Life Crime Labs, *Study Finds*, *NAT’L GEOGRAPHIC NEWS*, Aug. 8, 2005, available at [http://news.nationalgeographic.com/news/2005/08/0808\\_050808\\_forensics.html](http://news.nationalgeographic.com/news/2005/08/0808_050808_forensics.html)

32. KATHERINE RAMSLAND, *THE C.S.I. EFFECT* (2006).

33. Cole & Dioso-Villa, *supra* note 26. The discussion in this section draws heavily from that work.

34. Negative evidence refers to the notion of presenting testimonial evidence explaining the absence of physical evidence when the jury might construe that absence as significant. For example, the prosecution might call a forensic technician to testify that the

crime scene was dusted for fingerprints but none were found to preclude the defense from insinuating that the police were too lazy or too focused on the defendant to search for fingerprints.

35. See Cynthia A. Hoffner et al., *TV Characters at Work: Television’s Role in the Occupational Aspirations of Economically Disadvantaged Youths*, 33 *J. CAREER DEV.* 3, 15 (2006).

36. See, e.g., Michael M. O’Connor, *The Role of the Television Drama ER in Medical Student Life: Entertainment or Socialization?*, 280 *J. AM. MED. ASS’N* 854, 854 (1998).

37. See, e.g., John Randolph Fuller, *So You Want to Be a Serial-Murderer Profiler* . . . , *CHRON. HIGHER EDUC.*, Dec. 7, 2001, at B5.

38. See generally Barbara Prainsack & Martin Kitzberger, *DNA Behind Bars: Other Ways of Knowing Forensic DNA Technologies*, 39 *SOC. STUDIES OF SCI.* 51 (2009) (discussion of convicts’ perceptions of the strength of DNA evidence).



effect, and the police chief's effect—would constitute serious problems for society. If jurors are acquitting defendants that they would have convicted had the television program *CSI* never existed, this would constitute a serious challenge for the legal system. Such acquittals could, in some sense, be construed as wrongful acquittals. Likewise, if television programming is bolstering the credibility of government witnesses (the defendant's effect), wrongful convictions (in the broadest sense of the term) could result. Either of these effects, if true, would raise serious doubts about the integrity of the jury system that forms the foundation of American criminal justice. If juries are so sensitive to irrelevant influences that the current primetime television schedule has a significant impact on their verdicts, can we really sustain the dogged faith in the jury that remains such a cherished principle of American criminal justice? Finally, the police chief's effect would generate perhaps the greatest material harm. If true, the police chief's effect could mean that *CSI* is both increasing crime and decreasing detection of those crimes. However, it should be noted that the police chief's effect is, strictly speaking, a criminological matter not a legal one. If it were occurring, it would probably be detected and addressed by police, not judges.

The other three effects, on the other hand, would not seem to constitute genuine problems for society. For the weak prosecutor's effect, it would seem to comprise only a minor harm if prosecutors feel compelled to change their voir dire questioning to include asking jurors about their television-viewing habits. Prosecutors in cases with little or no forensic evidence might use peremptory challenges to strike heavy *CSI* viewers from the jury based on the supposition that such jurors would require forensic evidence to convict. Likewise, defense attorneys might strike heavy *CSI* viewers in cases that rest heavily on forensic evidence based on the supposition that such jurors would be more likely to afford great credibility to the prosecution's forensic expert witnesses. As discussed in the next section, neither of these suppositions is necessarily correct. Even so, litigants deploying their peremptory challenges in this manner would not seem to pose a significant legal problem. Similarly, prosecutors adopting the practice of explaining the absence of forensic evidence at trial would not seem to undermine the legal system's ability to deliver justice. Although it is true that the ordering of unnecessary forensic tests could constitute a drain on resources and add to backlogs at forensic labs, this, again, is not, strictly speaking, a problem to be solved by the legal system. The producer's effect is posited as a positive effect, provided that the educational aspects gleaned from the show are not wholly unrealistic or inaccurate. So, too,

might the educator's effect be considered favorable if it increases the quantity—and thus perhaps indirectly the quality—of applicant pools to forensic-science-degree programs.<sup>39</sup> There would seem to be few negative repercussions from the educator's effect beyond the disappointment of some young people when they learn that forensic science is neither as exciting nor as glamorous nor as easy as its depiction on television.

**Such acquittals could, in some sense, be construed as wrongful acquittals.**

In our earlier work, we cautioned that it was necessary to be vigilant against what we called “hypothesis swapping,” in which evidence supporting one supposed effect was used to support claims about the existence of a different effect.<sup>40</sup> In particular, it is not uncommon to see evidence of the weak prosecutor's effect advanced in support of claims that the strong prosecutor's effect is occurring.<sup>41</sup> For example, Maricopa County Attorney Andrew Thomas released a study claiming that jurors are reaching “conclusions contrary to the interests of justice” because of “a significant *CSI* influence.”<sup>42</sup> But, in fact, the study concedes that “verdicts have not yet noticeably changed from guilty to not guilty.”<sup>43</sup> Instead, the study has merely found the weak prosecutor's effect: “[P]rosecutors have had to take more and more preemptive steps to divert juries from reliance on television-style expectations.”<sup>44</sup> Thus, evidence supporting the weak prosecutor's effect is presented in support of the strong prosecutor's effect.

Judge Donald Shelton has reinterpreted the *CSI* effect as the “tech effect.”<sup>45</sup> He suggests that any apparent changes in juror behavior should not be attributed to television programming but rather to the underlying real technological developments that these programs depict.<sup>46</sup> Forensic science and technology have advanced enormously over the past century. Shelton asserts that the cause of changes in juror behavior is not *CSI* but rather the real-life technological improvements in forensic science.<sup>47</sup>

Shelton's argument raises an important caveat about the *CSI* effect. If we are to take seriously the notion of a *CSI* effect, it must be carefully disentangled from what Judge Shelton et al. call the “tech effect,” the effect of changes in the actual capabilities of forensic science. For example, if, as posited by proponents of a *CSI* effect, we do find that jurors' expectations for forensic evidence have increased, we would have to assume that this increase is caused by at least two factors. One factor would

39. It should be noted that many forensic scientists feel that aspiring forensic scientists are not well served by forensic-degree programs and would be better served by mainstream science programs. See, e.g., KEITH INMAN & NORAH RUDIN, PRINCIPLES AND PRACTICE OF CRIMINALISTICS: THE PROFESSION OF FORENSIC SCIENCE 302 (2001).

40. Cole & Dioso-Villa, *supra* note 26, at 453.

41. See, e.g., Enric Volante & Kim Smith, “*CSI Effect*” Impacts Justice in Tucson, ARIZ. DAILY STAR, May 8, 2005; CBS4 DENV., *supra* note 15.

42. *CSI*: MARICOPA COUNTY, *supra* note 21.

43. Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 YALE L.J. POCKET PART 70, 71-72 (2006) (available at <http://www.thepocketpart.org/2006/02/thomas.html>); see also *CSI*: MARICOPA COUNTY, *supra* note 21, at 5.

44. Thomas, *supra* note 43, at 72; see also *CSI*: MARICOPA COUNTY, *supra* note 21.

45. Shelton et al., *Juror Expectations*, *supra* note 5.

46. *Id.* at 362-65.

47. *Id.*

**[A]ctual evidence  
of the various  
effects is difficult  
to come by.**

be jurors' generally *accurate* perceptions of actual increases in the capabilities of forensic science. The other factor would be jurors' *inaccurate* perceptions of the capabilities of forensic science as imparted

by *CSI* and similar television programming. Surely, for example, we would not insist that jurors' expectations for forensic evidence should remain completely static. Their expectations *should* be different today than they were, say, a century ago. In the intervening years, numerous forensic technologies have been developed; we would not expect jurors' commonsensical expectations for forensic evidence to ignore these developments.

Our point is that the baseline against which the *CSI* effect should be measured is not a static baseline with no change in jurors' expectations for forensic evidence. Presumably, jurors' expectations should, appropriately, increase over time, in response to actual advances in forensic technology. The *CSI* effect, if there is one, would have to refer to a marginal increase in juror expectations that is *excessive of* whatever increase in expectations we should reasonably anticipate, given the technological developments that have actually occurred. What this means is that the tech effect, as Shelton et al. characterize it, is *not* a societal problem. It represents an appropriate increase in juror expectations in response to actual increases in forensic technological capacity. Only the supposed strong prosecutor's effect of wrongful acquittals would represent a genuine problem for the legal system.

### III. IS THE "CSI EFFECT" REAL?

Although the media coverage portrays the *CSI* effect as a well-documented phenomenon, actual evidence of the various effects is difficult to come by.<sup>48</sup> Media accounts rely largely on anecdotes and conclusory statements by various criminal justice system actors. Little reference is made to empirical data, and when such references are made, they usually note the absence of such data.<sup>49</sup> A review of the socio-legal literature reveals a rather different picture. Most legal scholars characterize claims of the most common *CSI* effect—the strong prosecutor's effect which would lead to wrongful acquittals—as speculative, and many suggest that the defendant's effect is equally plausible, even if mentioned less often by the media.<sup>50</sup> In this section, we review the various forms of evidence that

have been mustered in support of claims that there is a *CSI* effect, and we present some data on jury acquittal rates from state criminal trials that indicate no significant change in acquittal rates in response to *CSI*.

#### A. Anecdotes

Media coverage of the *CSI* effect relies heavily on anecdotes. Perhaps the highest-profile anecdote is the acquittal of *Baretta* television star Robert Blake from charges of murdering his wife, in which District Attorney Steve Cooley called the jury "incredibly stupid."<sup>51</sup> The prosecution provided evidence of motive and opportunity, but forensic evidence was lacking. In particular, Blake tested negative for gunshot residue, which was inconsistent with the theory that he fired the weapon that killed his wife.<sup>52</sup> We have suggested elsewhere that the Blake acquittal may be as indicative of a "celebrity defendant effect" as it is of a *CSI* effect.<sup>53</sup> However, numerous other lower-profile anecdotes abound—cases in which juries supposedly acquitted based on the lack of forensic evidence despite the non-forensic evidence presented at trial. In one sexual assault case, despite incriminating DNA evidence, the jury supposedly acquitted because of the failure to test a soil sample from the victim's cervix.<sup>54</sup> In another, a juror supposedly wanted a lawn tested for fingerprints.<sup>55</sup> Such media portrayals present anecdotal evidence based on journalists' interviews with prosecutors and jurors who claimed that the acquittals were in fact due to jurors' increased expectation of forensic-science evidence and techniques based on the television depictions in forensic programs such as *CSI*.<sup>56</sup> It is possible that the jury had good reasons for acquitting. For example, in reference to the Blake case jurors, Professor Laurie Levenson remarked, "[i]t was a reasonable-doubt case, and disagreeing with [Mr. Cooley, the District Attorney,] doesn't make them stupid."<sup>57</sup>

#### B. Surveys of Legal Actors

The second major form of evidence cited in support of the *CSI* effect is opinion surveys of legal actors: prosecutors, defense attorneys, and trial judges. These surveys focused on the perceived impact of forensic programs on jury verdicts, pretrial preparation, and trial strategy. Survey results generally indicate that, according to legal actors, the *CSI* effect is real and has had considerable impact on the carrying out of criminal trials.<sup>58</sup>

However, these surveys provide very little supporting evidence for the strong prosecutor's effect, which people typi-

48. See, e.g., Cole & Dioso-Villa, *supra* note 26; Tyler, *supra* note 23.  
49. See, e.g., Roane & Morrison, *supra* note 13; Lovgren, *supra* note 31.  
50. See, e.g., Podlas, *supra* note 23; Tyler, *supra* note 23.  
51. Julie Keller, D.A.: *Blake Jury "Incredibly Stupid,"* E Online (Mar. 24, 2005). [http://www3.eonline.com/uberblog/b49519\\_da\\_blake\\_jury\\_incredibly\\_stupid.html](http://www3.eonline.com/uberblog/b49519_da_blake_jury_incredibly_stupid.html)  
52. Houck, *supra* note 31, at 86.  
53. Cole & Dioso-Villa, *supra* note 26, at 455.  
54. See Andy Kravetz, "CSI" Making Impact in Courts, PEORIA J. STAR, Sept. 4, 2005.  
55. See Art Aisner, "CSI Effect" Put under the Scope, ANN ARBOR NEWS, May 18, 2007, at A1.

56. See, e.g., Klein, *supra* note 18.  
57. Keller, *supra* note 51.  
58. See Michael J. Watkins, *Forensics in the Media: Have Attorneys Reacted to the Growing Popularity of Forensic Crime Dramas?* (2004) (Thesis, Florida State University); CSI: MARICOPA COUNTY, *supra* note 21; Thomas, *supra* note 43; Monica L.P. Robbers, *Blinded by Science: The Social Construction of Reality in Forensic Television Shows and its Effect on Criminal Jury Trials*, 19 CRIM. JUST. POL'Y REV. 84 (2008). Dennis J. Stevens, *Forensic Science, Wrongful Convictions, and American Prosecutor Discretion*, 47 HOW. J. CRIM. JUST. 31 (2008).

cally think of when they think of the CSI effect. Many of the questions on these surveys focus on effects on legal actors' behavior, not jurors' behavior. Moreover, even when these surveys do seek to measure juror behavior, they do so indirectly. Rather than examining jurors about whether they were influenced by *CSI*, these surveys ask legal actors whether they think jurors were influenced by *CSI*. Thus, these surveys measure not whether jurors were influenced by *CSI*, but whether legal actors perceive jurors to have been influenced by *CSI*. In some cases, the legal actors claim to have spoken with the jurors; in others, they offer opinions about jury behavior without having spoken to the jurors. In either scenario, this makes for a poor measure of juror behavior, not merely because it is indirect, but also because legal actors are hardly unbiased perceivers of jurors' behavior and motivations.<sup>59</sup> Asking a prosecutor who has just completed a trial whether a jury acquittal was caused by the CSI effect, rather than by, say, insufficiency of the evidence, is clearly an unsatisfactory way of measuring whether the jurors were indeed influenced by *CSI*. Thus, to measure the strong prosecutor's effect, it would be far more preferable to survey jurors directly.

### C. Juror Surveys

To determine and measure whether there is a CSI effect, several studies surveyed jurors or potential jurors. In studies of this type, jury decision making can be compared between groups who watch *CSI* (and other forensic television programs) with those who do not.

Kimberlianne Podlas attempted to detect the CSI effect by using a rape-trial scenario with a consent defense where forensic evidence was neither provided nor necessary.<sup>60</sup> She surveyed 306 college students and asked them to reach a verdict of guilty or not guilty, where the expected or "legally correct" verdict for the case was not guilty. Podlas compared students who regularly watched forensic television programs with those who did not and found that there were no significant differences in their decision-making processes or the handing down of "not guilty" verdicts. The survey results did not indicate any increased expectation of forensic evidence by *CSI* viewers compared to non-*CSI* viewers.

To test the effects of *CSI* on jurors' expectations, Shelton administered a survey to 1,027 individuals called to jury duty in a county in southeast Michigan.<sup>61</sup> Respondents were asked about their television-viewing habits of crime dramas such as *CSI* and were presented with various scenarios of criminal cases and charges. Respondents were asked what types of evidence they expected to be presented at trial and what verdict they would hand down based on certain types of evidence presented by the prosecution and the defense. The results indi-

cated high expectations for forensic evidence by all subjects, and *CSI* viewers had higher expectations of all types of evidence (forensic and non-forensic) than did non-*CSI* viewers. Any differences found between *CSI* and non-*CSI* viewers were marginally significant and were counter to the strong prosecutor effect. Respondents' increased expectations of scientific evidence did not translate into a requirement for handing down guilty verdicts. For example, *CSI* viewers were more likely than non-*CSI* viewers to find eyewitness testimony valuable when reaching a verdict without any scientific evidence. The authors suggest that the increased expectations of forensic evidence might have little to do with whether or not jurors watch forensic television programs, but instead they may reflect a broader notion in society of an increased awareness about technological advances. Instead of a CSI effect, they posited a general tech effect experienced by everyone.

Kiara Okita surveyed more than 1,200 Canadians about their attitudes toward forensic science.<sup>62</sup> Like Shelton, Okita found that *CSI* viewers and nonviewers did not differ significantly in their perceptions of the accuracy and necessity of forensic science for investigating crimes. Indeed, in some cases nonviewers perceived forensic science to be more accurate than viewers did. However, Okita notes that even those differences between viewers and nonviewers that she did find were so small that they were unlikely to be operationalized, say, by producing different verdicts. As she summarizes:

Regardless of *CSI* viewership, respondents' [sic] appear to consider forensic science, in general, to be somewhere between accurate or usually accurate, and between somewhat necessary and necessary in determining criminal guilt. Therefore again, contrary to the assertions of CSI effect claimants, respondents do not appear to perceive forensic science as completely accurate and always necessary in determining criminal guilt.<sup>63</sup>

Finally, in a series of studies, Steven Smith and colleagues found evidence of changes in legal professionals' behavior (the weak prosecutor's effect), and found evidence suggestive of the defendant's effect.<sup>64</sup> But they found little evidence supporting the strong prosecutor's effect.

### D. Psychological Experiments

Another approach to measuring the CSI effect is to conduct simulations of jury deliberations using mock jurors, usually

**The survey results did not indicate any increased expectation of forensic evidence by CSI viewers...**

59. See Cole & Dioso-Villa, *supra* note 26; Tyler, *supra* note 23). (speculating that the CSI effect describes prosecutors' attempts to understand jury behavior).

60. See Podlas, *supra* note 23, at 455-61.

61. See Shelton et al., *Juror Expectations*, *supra* note 5, at 332-39.

62. See Okita, *supra* note 25.

63. *Id.* at 103.

64. See Steven M. Smith et al., Exploring the CSI Effect: Is it Real?, If so, What is it? Address at North American Correctional and Criminal Justice Psychology Conference, in PROCEEDINGS OF THE NORTH AMERICAN CORRECTIONAL & CRIMINAL JUSTICE PSYCHOLOGY CONFERENCE, 2008, at 81, 83.

**CSI viewers  
perceived  
themselves as  
having a better  
understanding  
of forensic  
scientists...**

college students. Although college student populations are not representative of actual jury pools, jury simulations allow researchers to conduct controlled experiments. Kimberlianne Podlas's second study included 538 mock jurors who deliberated in small groups about two crime scenarios where forensic evidence was neither necessary, nor referenced.<sup>65</sup> Podlas

tested for the strong prosecutor's effect as measured by not guilty verdicts or wrongful acquittals for each scenario. She found no indication that *CSI*-viewing jurors acquitted in cases that warranted convictions, nor did she find that *CSI* viewers relied on forensic evidence to a greater degree than their non-*CSI*-viewing counterparts.

While previous studies examined the strong prosecutor's effect of potential jurors acquitting defendants due to their increased expectation of forensic science, Schweitzer and Saks tested both the strong prosecutor's effect and the defendant's effect—that potential jurors who watch *CSI* have exaggerated faith in the capabilities of forensic science and give this evidence more weight than it may deserve.<sup>66</sup> Their sample included 48 college students who were asked to review a transcript of a mock criminal trial where the key piece of inculpatory evidence was a hair left at the crime scene. They included testimony by a forensic scientist who performed the microscopic hair analysis that identified the defendant, which overstated the probative value of the evidence—something that is apparently not uncommon for hair evidence.<sup>67</sup> Subjects were asked about their television-viewing habits and their perceptions about the case and forensic evidence presented. *CSI* viewers perceived themselves as having a better understanding of forensic scientists and their techniques than non-*CSI* viewers, and they were more critical of the forensic evidence presented in the transcript. Schweitzer and Saks interpreted this as indirect evidence of an increased expectation of high-tech forensic science perhaps consistent with *CSI*'s depictions of forensic techniques and a tendency to find less high-tech or glamorous techniques less convincing. Similarly, in a study of 140 college students, Jenkins found *CSI* viewers more sensitive to possible flaws in a forensic assay that was discussed in a mock-trial transcript.<sup>68</sup>

## E. Acquittal-Rate Data

Even if surveys and jury simulations did provide evidence for the strong prosecutor's effect, one would presumably want to look for changes in the rate of jury acquittals in American criminal trials before concluding that *CSI* is influencing jury verdicts. The strong prosecutor's effect holds that jurors are acquitting in cases in which they would have convicted had the television program *CSI* never existed. If this effect is occurring, therefore, it would be expected to manifest itself through an increase in jury acquittals following the advent of the program. In earlier work, we examined data on the jury acquittal rate in federal courts, and we found no discernable increase in acquittal rates following the advent of *CSI*.<sup>69</sup> In fact, if anything, there appeared to be a decrease in the acquittal rate after *CSI*. Were this decrease to be significant it would support the defendant's effect, the claim that *CSI* actually benefits prosecutors. Recall that in some legal scholars' view this effect is equally theoretically plausible.<sup>70</sup> Loeffler supported this finding, determining that there was no evidence of an increase in acquittals after examining the acquittal rate of four large states.<sup>71</sup> Looking at Canadian data, Benoît Dupont also found no discernable increase in acquittals that was attributable to *CSI*.<sup>72</sup> Although overall Canadian acquittals did rise after 2000, Dupont notes that acquittals had been steadily rising for a long time before 2000, and he concludes that *CSI* does not appear to have had an influence on this trend.

We sought to carry this project forward by gathering acquittal rate data from all U.S. jurisdictions. Over the course of six months, we conducted Internet searches of state administrative offices of courts' websites and follow-up contacts via email and phone with state court administrators. We surveyed all fifty states to determine whether suitable acquittal-rate data were available. We were able to obtain acquittal-rate data on felony jury trials from eleven states.<sup>73</sup> However, the states varied in terms of how long they had been compiling dispositional data from criminal jury trials. They ranged from Florida, which has such data from as far back as 1986, to Kentucky, which began compiling data in 2006. There were only eight states for which we were able to ascertain acquittal rates both before and after the advent of *CSI* in 2000: California, Florida, Hawaii, Illinois, New York, North Carolina, Texas, and Vermont.

We compiled acquittal rates for all jury verdicts from the felony trial courts of these eight states and the federal district

65. See Kimberlianne Podlas, *The "CSI Effect" and Other Forensic Fictions*, 27 LOY. L.A. ENT. L. REV. 87 (2006-2007).

66. See N.J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction about Forensic Science Affects the Public's Expectations about Real Forensic Science*, 47 JURIMETRICS J. 357 (2007).

67. See Margaret A. Berger, *The Impact of DNA Exonerations on the Criminal Justice System*, 34 J.L. MED. & ETHICS 320, 322 (2006).

68. See Gwen Jenkins et al., *The CSI Effect: Mock Jurors' Sensitivity to the Reliability of Forensic Evidence*, Address at Annual Meeting of the American Psychology-Law Society, Jacksonville, Fla. (Mar. 5-8, 2008).

69. Cole & Dioso-Villa, *supra* note 26, at 462.

70. See, e.g., Tyler, *supra* note 23, at 1084; Podlas, *supra* note 23, at 461.

71. Loeffler, *supra* note 26. (The states were New York, Texas, Illinois, and California.)

72. Benoît Dupont, *The CSI Effect: Myths and Reality*, Address at 29th annual conference of the Canadian Identification Society (2006).

73. These eleven states were California, Florida, Hawaii, Illinois, Kentucky, Missouri, New York, North Carolina, South Dakota, Texas, and Vermont.

courts.<sup>74</sup> In most cases, these were restricted to felony trials, although the types of crimes were not designated in this data. In one case, the acquittal rates include a small number of misdemeanors because the felony trial courts (the California Superior Courts) adjudicate a small number of misdemeanors as well as felonies.<sup>75</sup> Although data on jury verdicts in misdemeanor trials were available for a few states (Texas, Florida, and Vermont), we opted not to include this data in our analysis because of the strong possibility that misdemeanor jury trials differ from felony jury trials.

We were able to obtain data reporting the outcomes (conviction or acquittal) for all felony jury trials (plus a small number of serious misdemeanor trials from California) that went to verdict for the states. We found that acquittal rates are fairly stable over time although, not surprisingly, they fluctuate far more in the two smallest jurisdictions. Indeed, the data show a strong main effect of jurisdiction on acquittal rates. In other words, each jurisdiction's acquittal rate appears to be quite stable over time, and jurisdiction appears to have a far greater influence on the probability of acquittal than does year. A defendant would be better off being tried in Florida than in California both before and after the advent of *CSI*, and, even if there is a *CSI* effect, it would appear to be a minor issue compared to the influence of jurisdiction.

Although there is no reason to expect that any *CSI* effect would be felt differentially in different states, the various states do not follow a wholly consistent pattern. Overall, there does appear to be a slight rise in acquittals in 2001 and 2002. Interpreting this small rise as the strong prosecutor's effect, however, raises several concerns. First, after 2002, the acquittal rate drops back to 1998-2000 levels, suggesting that even if there had been a strong prosecutor's effect in 2001-2002, it was short-lived (or prosecutors compensated for it and stopped bringing susceptible cases to trial). Second, the acquittal rate was already rising before the advent of *CSI*. The acquittal rates of 2001-2002 might simply be extensions of this trend, rather than reactions to *CSI*. Third, the aggregate acquittal rate in 1996 was as high as the post-*CSI* acquittal rates of 2001-2002.

It may be that it is the 1997 drop in acquittals that requires explanation, rather than increase that followed it. At the same time, the trend toward a drop in acquittals that we noted earlier in the federal courts appears even more pronounced now that we have data for two additional years. Whereas in our prior study we found a drop to an 11% federal acquittal rate in 2005, we now see that the acquittal rate has remained at this historically low rate for three consecutive years.

In short, the acquittal-rate data would seem to offer only equivocal support for only a very small and short-lived strong prosecutor's effect. Can we conclude anything more definitive from this data? How to deal with time-series data of this sort is not obvious. For instance, it is not clear whether the pre-*CSI* acquittal rate should be treated as the acquittal rate for 2000, the year immediately preceding the advent of the program, or the aggregate acquittal rate of a greater range of years, such as 1997-2000. Similarly, it is not clear how best to account for temporal trends in the acquittal rate that preceded the advent of *CSI*. We were not able to find any studies that attempt to model changes in jury verdicts in response to a historical event. Without any such study in hand upon which to model our analysis, we conducted two analyses.

In the first analysis, we treated the acquittal rate of each jurisdiction as an observation. This gave us a total of 132 observations drawn from nine jurisdictions between 1986 and 2008. Since *CSI* began airing in 2000, if *CSI* viewership had an effect on jury verdicts, we would expect a change in acquittal rates as early as fiscal year 2001. We also looked at differences in acquittal rates in the following three years after the first airing of *CSI* to account for the possibility of a lag effect in which *CSI* did not have an immediate impact but did have an impact after some years of media saturation. Indeed, one might expect

**[J]urisdiction appears to have a far greater influence on the probability of acquittal than does year.**

74. The sources of the data are: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, available at <http://www.albany.edu/sourcebook>; CIR. COURTS OF ILL., CASELOAD AND STATISTICAL RECORDS, available at <http://www.state.il.us/COURT/SupremeCourt/AnnualReport/2006/Stat/caseload.pdf>; FLA. OFFICE OF THE STATE COURTS ADM'R, FLORIDA'S TRIAL COURTS STATISTICAL REFERENCE GUIDE, available at [http://www.flcourts.org/gen\\_public/stats/reference\\_guide.shtml](http://www.flcourts.org/gen_public/stats/reference_guide.shtml); JUDICIAL COUNCIL OF CAL., ANNUAL DATA REFERENCE FOR 1994-1995, available at [http://www.courtinfo.ca.gov/reference/3\\_stats.htm](http://www.courtinfo.ca.gov/reference/3_stats.htm); JUDICIAL COUNCIL OF CAL., COURT STATISTICS REPORTS, STATEWIDE CASELOAD TRENDS, available at [http://www.courtinfo.ca.gov/reference/3\\_stats.htm](http://www.courtinfo.ca.gov/reference/3_stats.htm); N.C. JUDICIAL BRANCH, ADMIN. OFFICE OF THE COURTS, CASELOAD INVENTORY BY COUNTY, SUPERIOR COURT CRIMINAL, DISPOSITION ACTIVITY, STATEWIDE SUMMARY (courtesy of Mr. Patrick Tamer, Statistical Programmer Analyst, Research and Planning Div., N.C. Admin. Office of the Courts); OFFICE OF CT. ADM'R, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY, available at <http://www.courts.state.tx.us/pubs/annual-reports.asp>; STATE OF HAW., JUDICIARY, OFFICE OF THE ADMIN. DIR., STATEWIDE CIR. CT.

CRIM. (on file with STAN. L. REV.); STATE OF N.Y., REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS, available at <http://www.courts.state.ny.us/reports/annual>; STATE OF VERMONT SUP. CT., JUDICIAL STATISTICS (2000) (on file with STAN. L. REV.); STATE OF VT. SUP. CT., JUDICIAL STATISTICS (1999) (on file with STAN. L. REV.); STATE OF VT. SUP. CT., JUDICIAL STATISTICS (1998) (on file with the STAN. L. REV.); VT. JUDICIARY, ANNUAL STATISTICS, DIST. CT., available at <http://www.vermontjudiciary.org/Statistics/default.aspx>.

75. The California data do not allow the removal of misdemeanors because, although convictions are broken out into felonies and misdemeanors, acquittals are aggregated. We do not feel that the inclusion of a small number of California misdemeanors in the felony data is likely to substantially distort our findings. To give some idea of what we mean by a "small number" of misdemeanors: in 2007, misdemeanors accounted for 4.5% of all convictions recorded by the California Superior Courts. See JUDICIAL COUNCIL OF CAL., COURT STATISTICS REPORTS, STATEWIDE CASELOAD TRENDS (2008), available at <http://www.courtinfo.ca.gov/reference/documents/csr2008.pdf>



**One obvious possibility is that [the CSI effect] is nothing more than a media phenomenon.**

that the CSI effect would be felt after a large number of aggregate exposures to CSI and similar programs. Linear regressions of acquittal rates before and after 2000, after the first airing of CSI, found no statistically significant difference.<sup>76</sup> When we tested before and after the years

2001, 2002 and 2003, we also found no statistically significant difference in acquittal rates before and after any of these years. These results suggest that the changes in acquittal rates following the introduction of CSI are very likely the result of chance, and, certainly, the possibility that they are due to chance cannot be ruled out.

One disadvantage of Analysis 1 is that it treats each state's annual acquittal rate as a single observation. But such observations refer to a great many more trials in the case of California than in the case of Vermont. Analysis 2 overcomes that disadvantage by treating each trial that went to a jury verdict as an observation. In other words, we treated our data as if it was a random sample of American jury verdicts.<sup>77</sup> States were irrelevant in this analysis, except as a means of obtaining a sample of American jury verdicts. We found a statistically significant increase in acquittal rates from the years pre-CSI to post-2001 and post-2002, but not post-2003. As discussed above, there are a number of plausible explanations for this increase in addition to a two-year CSI effect. One is that this increase in acquittal rates post-CSI may be attributed to the general trend of rising acquittal rates beginning in 1997 and may not be attributable to any CSI effect. Indeed, we also found a statistically significant increase in acquittals between 1997-1999 and 2000, the year *before* CSI went on the air. Similarly, if we compared just 2000, the one year prior to CSI, to the post-CSI years, there was no longer a significant increase in acquittal rates; and in the case of one comparison, there was a statistically significant *decrease* in the proportion of acquittals.

Another possibility is that two or more different CSI effects may be canceling each other out. For instance, the strong prosecutor's effect and the defendant's effect might both be occurring and canceling one another out, one driving acquittals up, the other driving them down. Or, the strong prosecutor's effect may be occurring, but prosecutors may be compensating by not bringing the affected cases to trial, by effectively screening out jurors affected by it in voir dire, or by

effectively explaining the absence or weakness of forensic evidence. Under such a scenario, the CSI effect would be occurring, but it would not be detected in acquittal rates. In a sense, the strong prosecutor's effect would be canceled by the weak prosecutor's effect. Or, unknown other historical changes for which we have not accounted may have affected the acquittal rate during the period we analyzed and may have counteracted the CSI effect. For example, the September 11, 2001 attack on the World Trade Center and Pentagon comes to mind as an event that falls within the period of analysis that might have conceivably had an impact on acquittal rates. Similarly, a major legal change—such as a landmark Supreme Court ruling on evidence law—might shift acquittal rates, although we are not aware of such a decision during the relevant period. In sum, given the equivocal nature of the data and the relatively small changes in acquittal rates, existing acquittal-rate data would not seem to warrant panic about the existence of a CSI effect.

#### IV. ALTERNATE EXPLANATIONS

In short, there is very little evidence at this time that there is any CSI effect. Why then does the problem receive so much media attention that treats the phenomenon as a serious problem for the judicial system? One obvious possibility is that it is nothing more than a media phenomenon. Sociologists have long noted the existence of “media panics,” in which the media exaggerates the danger of some supposed social problems.<sup>78</sup> In the case of the CSI effect, such an interpretation is particularly interesting because it is the media itself that generates the social phenomenon that is problematized.

Another obvious interpretation is that the CSI effect amounts to “sour grapes” by prosecutors. As the acquittal data shows, prosecutors are not accustomed to losing jury trials. To a prosecutor surprised, or just disappointed, by an acquittal, the CSI effect presents a ready, appealing explanation. The Thomas study smacks of this notion. What prosecutor who lost a conviction would not avail herself of the CSI effect as an explanation? Cooley's response to the Blake acquittal also evokes the “sour grapes” hypothesis. Professor Levenson remarked, “[i]t was a reasonable-doubt case, and disagreeing with Mr. Cooley doesn't make [the jury] stupid.”<sup>79</sup> Professor Scheck argued that the Blake acquittal reflected an absence of evidence, not the CSI effect.<sup>80</sup> Ms. Nethercott has suggested that what prosecutors call the CSI effect might be viewed simply as punishment for failure to test relevant evidence.<sup>81</sup> At least one prosecutor, however, has denied the “sour grapes” hypothesis.<sup>82</sup>

76. For further details on these analyses, see Simon A. Cole & Rachel Dioso-Villa, *Investigating the “CSI Effect” Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1359 (2009).

77. Strictly speaking, our sample was not random. It was a convenience sample dictated by which states compile acquittal-rate data. Nonetheless, we think it is still appropriate to treat the sample as random because we did not exercise any choice in selecting which states would supply the sample data.

78. See, e.g., STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (1972);

ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS* (1994); PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* (1998).

79. Keller, *supra* note 51.

80. Andrew Blankstein & Jean Guccione, “CSI” Effect or Just Flimsy Evidence? *The Jury Is Out*, L.A. TIMES, March 18, 2005, available at <http://articles.latimes.com/2005/mar/18/local/me-jurors18>.

81. Jamie Stockwell, *Defense, Prosecution Play to New “CSI” Savvy*, WASH. POST, May 22, 2005, at A1; Kravetz, *supra* note 54.

82. Kravetz, *supra* note 54.

Professor Tyler favors “media panic” and “sour grapes” explanations:

The *CSI* effect is probably most important as an example of the way that a broad consensus about the existence of a legally relevant “fact” can emerge out of unsystematic and untested anecdotal observations, in this case by prosecutors and other court observers seeking to explain acquittals that they find puzzling.<sup>83</sup>

A third interpretation is that both prosecutors and defense attorneys, true to the adversary system, are engaging in strategic gamesmanship to try to tilt the playing field for the next trial. This puts the weak prosecutor’s effect, which claims that it is necessary to address *CSI* in voir dire, in a new light. Voir dire, obviously, has functions other than choosing jurors, such as influencing the jury.<sup>84</sup> Both sides may be seen as trying to influence the jury pool by getting the media to propagate the story that their side is being increasingly disadvantaged by the *CSI* effect. In other words, litigators seek to benefit from media stories that claim that the other side has been unfairly benefited by television programming. We might call this the “*CSI* effect effect,” the effect of media about the *CSI* effect on criminal trials. If this is indeed the case, it is the prosecutors who have been spectacularly successful. They have turned a television show that may well *enhance* the credibility of forensic evidence into a perceived liability, convinced the media that prosecutors are now unfairly *disadvantaged* in the typical U.S. criminal trial, and turned the *acquittals* into an apparent social problem.

## V. WHAT CAN JUDGES DO?

Whether the *CSI* effect is real or not, however, many actors in the criminal justice system, such as attorneys, expert witnesses, and now, due to media coverage of the *CSI* effect, even jurors themselves, believe it is real, and, therefore judges are going to have to confront it. State trial court judges have several ways to confront the *CSI* effect.

**1. Voir Dire.** There are numerous anecdotal reports of attorneys, or even judges,<sup>85</sup> asking jurors whether they watch *CSI* or other forensic-themed media and of statements in voir dire to the effect of “[y]ou do realize that most of that stuff on ‘*CSI*’ is made up?”<sup>86</sup> Should judges permit such questioning? Judge Shelton

argues that questioning jurors about television-viewing habits is “certainly proper.”<sup>87</sup> However, it is well understood that judges must remain vigilant to ensure that probing for bias does not bleed over into improper efforts to influence the jury.<sup>88</sup> Indeed, attorneys acknowledge, and in some cases even openly recommend, using voir dire as “an opportunity to influence jurors”<sup>89</sup> or for “legal” or “factual indoctrination.”<sup>90</sup> “Questions” about the *CSI* effect that are actually statements, like that cited above, would seem to bear a great risk of crossing that line. Judges would probably be well advised to preclude attorneys from making declarative statements during voir dire about the supposed “true” capabilities of forensic science, versus those depicted on *CSI*. First, it would be unduly burdensome to expect the judge to police the verisimilitude of attorneys’ representations of the true capabilities of forensic science. Second, such statements would seem to fall outside the goal of detecting prejudice. Indeed, such statements may end up creating bias, rather than detecting it.

It is also well established that attorneys cannot ask jurors to “commit” to a specific verdict or a specific weight to assign a specific type of evidence during voir dire.<sup>91</sup> In some cases, litigants have alleged that attorneys invoking the *CSI* effect have sought to elicit such commitments. For example, in one case, the following statement was made during voir dire:

BY THE DISTRICT ATTORNEY (voir dire): . . . [Y]ou know, if you watch TV a lot, you probably get to watch—I don’t know how many of you—how many of you watch *CSI*? Well, raise your hand. See, there’s a lot of you. A lot of you. It’s a very popular show. My kids love it. All right. They’re older and they love that show. They like *Law and Order*.

But, can everybody tell me that they can separate what they see on TV from what you see in the courtroom? I know that sounds like a silly question, but some people go, oh, well, it was on *CSI*, so how come they don’t do it in every case? All right. And I can tell you how I know, I know *CSI* and *Law and Order* are make-believe. If you flip the channel, you may see Scotty beaming somebody

**State trial court judges have several ways to confront the *CSI* effect.**

83. Tyler, *supra* note 23, at 1050-1085, 1083. (“The *CSI* effect has become an accepted reality by virtue of its repeated invocation by the media.”)

84. See Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 548 n.15 (1975).

85. Cynthia Di Pasquale, *Beyond the Smoking Gun*, BALTIMORE DAILY REC., Sept. 8, 2006.

86. Robert Yates, Editor’s Note, CHI. LAW., May 2008; see also Brian Krans, “*CSI*” Doesn’t Measure Up, QUAD CITIES ONLINE, Sept. 19, 2005; Melissa Dribben, *Trial by ‘CSI,’* PHILA. INQUIRER, Feb. 19, 2006.

87. Shelton, *Forensic Science Challenges*, *supra* note 5, at 381.

88. Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 431 (1985) (noting voir dire’s “sus-

ceptibility to improper uses, especially indoctrinating or building rapport with the jurors by improper questioning”).

89. Richard J. Crawford & Daniel W. Patterson, *Exploring and Expanding Voir Dire Boundaries: A Note to Judges and Trial Lawyers*, 20 AM. J. TRIAL ADVOC. 645 (1997); see also Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak about Voir Dire*, 51 WAYNE L. REV. 163, 382 (2005).

90. Lisa Lindsey, *quoted in* Edward J. Imwinkelried, *Dealing with Supposed Jury Preconceptions about the Significance of the Lack of Evidence: The Difference between the Perspective of the Policymaker and that of the Advocate*, 27 T.M. COOLEY L. REV. 37 (2010).

91. John T. Bibb, *Voir Dire: What Constitutes an Impermissible Attempt to Commit a Prospective Juror to a Particular Result*, 48 BAYLOR L. REV. 857, 858 (1996).

**[O]ne state, Ohio, now includes a direct reference to CSI in its pattern instruction.**

else up, and that's on TV. All right? So, can everybody tell me—and, again, this kind of goes to the burden of proof, you know, about what evidence you have—and can everyone tell me that they will listen to the evidence

and not speculate because they don't have, say, DNA or they don't have fingerprints and things you may see or hear about on CSI? Can everyone tell me they can do that? Yeah?<sup>92</sup>

In that case, the court ruled that this was not an improper elicitation of a commitment from the jury.<sup>93</sup> Indeed, courts have generally viewed all discussion of *CSI* in voir dire as permissible, and courts have also denied *Batson* challenges in which *CSI* viewing was offered as an explanation for striking jurors.<sup>94</sup>

**2. Negative Evidence.** There are numerous reports of increases in the presentation of “negative-evidence” testimony in criminal trials.<sup>95</sup> “Negative evidence” generally refers to evidence introduced that is not directly probative of the defendant's guilt. Rather, negative evidence attempts to explain the absence of forensic evidence to rebut or preempt defense arguments that if the defendant were the perpetrator, their state should have been able to find some (or more) forensic evidence linking him to the crime.

It is difficult to see anything of legal concern for judges about the presentation of negative evidence. In most cases, such evidence would not be prejudicial, and it would seem to be the prosecutors' prerogative to present it.

Negative evidence might, however, raise concerns about judicial economy. The presentation of large amounts of negative evidence at a particular trial might greatly increase the duration, complexity, and expense of the that trial, and these increases might be exacerbated by the recent *Melendez-Diaz* ruling in the U.S. Supreme Court, which may impose significant logistical difficulties by requiring the coordination of in-person appearances by a large number of expert witnesses.<sup>96</sup> Likewise, vast increases in the presentation of negative evidence systemwide could impose significant administrative costs for the judicial system as a whole. Courts have generally given prosecutors wide latitude to present negative evidence.<sup>97</sup> One legal scholar argues that the government's prerogative to

present its case as it sees fit probably compels the admittance of negative evidence in most instances.<sup>98</sup> However, a recent psychological study found that, in simulated cases involving so-called “date-rape drugs,” the presentation of negative evidence “completely negated” testimony about negative findings from tests for date-rape drugs.<sup>99</sup> This suggests that, in at least this particular scenario, negative evidence may be “too powerful,” in that it appears to erase all probative value from evidence that would seem to have at least some probative value.

**3. Jury Instructions.** One way of minimizing the amount of trial time expended on negative evidence would be to issue a jury instruction. A jury instruction along the lines of the familiar maxim, “the absence of evidence is not evidence of absence” could render much negative evidence unnecessary. Most jurisdictions require courts to use pattern instructions. At least one state, Ohio, now includes a direct reference to *CSI* in its pattern instruction.<sup>100</sup> Although most jurisdictions require judges to use the pattern instructions, some allow trial judges the discretion to craft their own instructions. At least some judges have exercised this discretion to deliver instructions aimed at counteracting the *CSI* effect. For example, “a believer in the *CSI* effect,” Baltimore City circuit court Judge Wanda Heard “created a new instruction specifically to address scientific evidence. It explains what evidence is and also that the state's burden of proof does not require it.”<sup>101</sup>

Should such instructions be encouraged or permitted, or should pattern instructions be revised? Professor Imwinkelried concludes that there is not yet sufficient evidence to warrant a policy decision to create pattern instructions to address the absence of evidence.<sup>102</sup> However, he allows that further research supporting recent findings by Judge Shelton that jurors are particularly sensitive to the absence of DNA evidence in rape cases might warrant a policy of mandatory instructions on the non-necessity of DNA evidence in rape cases.<sup>103</sup> A number of trial courts have given negative evidence instructions testimony over defense objections.<sup>104</sup> Appeals courts have generally not treated the introduction of such evidence as error.<sup>105</sup>

While the issuance of such instructions in jurisdictions that allow judges the discretion to depart from, or add to, pattern instructions would seem to carry very little risk of reversible error, judges might still wish to consider the wisdom of issuing such instructions based on arguments grounded in claims of a supposed *CSI* effect. The “absence of evidence” problem, after

92. *Goff v. State*, 14 So.3d 625, 652 (Miss. 2009).

93. *Id.* at 653.

94. Shelton, *Forensic Science Challenges*, *supra* note 5, at 382.

95. See, e.g., Mark Hansen, *The Uncertain Science of Evidence: Some Testimony from Expert Witnesses in Criminal Trials Is Having Trouble Standing Up to Tougher Scrutiny from the Courts*, 91 A.B.A.J. 48 (July 2005); Richard Willing, *Medium Sends Message to U.S. Court System: “CSI” Effect Has Juries Wanting More Evidence*, CHI. SUN-TIMES, Aug. 15, 2004, at 1.

96. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (U.S. 2009).

97. *U.S. v. Fields*, 483 F.3d 313, 355 (5th Cir. 2007); *State v. Cooke*, *supra* note 10; see also Gwen Jenkins & Regina Schuller, *The Impact of Negative Forensic Evidence on Mock Jurors' Perceptions of*

*a Trial Drug-Facilitated Sexual Assault*, 31 LAW & HUM. BEHAV. 369, 370 (2007) (Similar case in Canada).

98. Tamara F. Lawson, *Before the Verdict and Beyond the Verdict: The CSI Infection within Modern Criminal Jury Trials*, 41 LOY. U. CHI. L. J. 119, 168 (2009).

99. Jenkins & Schuller, *supra* note 97, at 377.

100. Ohio State Bar Association Jury Instructions, §I.C.3.

101. Pasquale, *supra* note 85.

102. Imwinkelried, *supra* note 90.

103. *Id.*; Shelton et al., *Indirect-Effects Model*, *supra* note 5, at 21.

104. Shelton, *Forensic Science Challenges*, *supra* note 5, at 370, 388.

105. *Id.* at 388.

all, predates *CSI*, and so do its remedies. Judges should consider whether the existing reasonable-doubt instructions already do enough to address the problem of absence of evidence. Moreover, issuing such instructions may start courts down a slippery slope: by responding to arguments based on perceptions of a *CSI* effect, judges may be inviting future demands for instructions based on whatever “effects” attorneys perceive from future media treatments of law.

**4. Opening and Closing Arguments.** The final area in which judges may have to decide whether or not to allow references to *CSI* is in opening and closing arguments. In a number of cases, attorneys have used *CSI* as a foil to seemingly explain the less-than-overwhelming nature of the scientific evidence in their particular case. In one opening argument, a prosecutor advised the jury: “Now, keep in mind when you’re listening to the testimony from the witness stand this is not *CSI* Miami, it’s not *Law and Order*. Nobody involved in this case, no one in this room is an actor. These are real people.”<sup>106</sup> In another case, in closing argument, an attorney argued:

The one issue left in this case is: Was it him? The defense would say, well—and you know they will—there’s [sic] no fingerprints of him[.] They didn’t print the money. They didn’t find his prints on the note. In today’s day and age, unfortunately, the police and the State isn’t [sic] put to the same test that they wrote 200 years ago in the Constitution [in] which they said the proof must be beyond a reasonable doubt. Unfortunately, the test, of course, of criminal defendants now is, can they meet the TV expectation that they hope folks like you want. Can they meet *CSI*?

[Objection overruled]

[I]f they don’t have fingerprints, he can’t be guilty. On TV, they would have found fingerprints. But this isn’t TV, this is real life.<sup>107</sup>

Appeals courts have been divided as to whether such statements constitute error. The distinction seems to hinge on whether the claim that there is a “TV standard of proof” is interpreted as belittling or reinforcing the beyond the reasonable doubt standard.<sup>108</sup>

## VI. CONCLUSION

Should judges worry about the *CSI* effect? While there does not seem to be anything wrong with attorneys reacting to *CSI* within the framework of existing rules and procedures, there does not seem to be a good reason at this time to change existing rules and procedures. Judges should also be vigilant to ensure that invoking *CSI* does not become “cover” for practices that should not be permitted, like improperly biasing or eliciting commitment from the jury. Judges inclined to think *CSI* warrants changes in existing rules and procedures might consider two key points. First, as Judge Shelton argues, some

raising of juror expectations for forensic science is appropriate given actual, not fictional, technological developments. Second, changing existing rules and procedures in response today’s media sets a precedent for similar interventions in response to tomorrow’s media. If judges think the jury system is so weak that verdicts can be altered by prime-time television programming, we all have a lot more to worry about than *CSI*.



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106. *Mathis v. State*, 2006 WL 2434741 (Del) at \*4.

107. *Boatswain v. State*, *supra* note 22, at \*1-2.

108. Shelton, *Forensic Science Challenges*, *supra* note 5, at 383; see also, *United States v. Gentles*, 619 F.3d 75 (1st Cir. 2010).

# High-Profile Cases:

## Are They More Than a Wrinkle in the Daily Routine?

Robert Alsdorf

In our daily work as judges every ruling is of critical importance to the immediate parties. Most escape notice by the media. But from time to time, we are presented with cases where press and public join the fray.

How do we address these cases? How should we address them? High-profile cases certainly appear to differ from the norm, if for no other reason than the extent of the pressures they clearly impose on us. But, at heart, do they really require us to change what we do?

I was presented with a high-profile case a little more than a decade ago, one that the court on which I served and I both chose to handle in a way that differed from our customary approach. Despite all the apparent or superficial differences, in the end I came to the conclusion that while a high-profile case unavoidably requires varying degrees of logistical adaptation, its substantive resolution is effective only if it is guided by the very same principles we apply to our daily practice of the judicial art.

This is my story.

In 1999, the State of Washington had long had a motor vehicle excise tax, the MVET, that provided the State with substantial revenue that it spread among a broad array of state programs, many of them entirely unrelated to motor vehicles. Given the size and duration of the tax, it was understandable that the public disliked the MVET. I was not immune to those feelings. Several years earlier, I had bought a used car and found to my frustration not only that the tax rate was high but also that the basis for my specific tax calculation was twice what I had actually paid for the vehicle. Even modest vehicles could bring with them a tax tab that would add up to thousands of dollars in just a few years. Despite repeated public demand, the legislature had not limited or revised this tax.

Enter the public's solution to the MVET problem. Like a good number of states, Washington has an initiative process by which citizens can gather signatures to place a draft law before the voters. In 1999, an initiative known by its number as I-695 was placed on the ballot. It was drafted to require a reduction of the MVET to a flat \$30 per year per vehicle and, at least as important, to require that a public vote be scheduled and held before any governmental entity could increase *any* tax, fee, or charge.

I-695 passed with a substantial majority of the popular vote. The law's passage threatened significant cuts in public funding for numerous programs. Therefore, as soon as the vote count was finalized, the law was challenged by a number of public and private entities, several citizens, and a public union. Suits were filed in various counties around the state.

All of these cases were consolidated and then assigned to my court. I was not worried. It promised to be an extremely interesting case. The lawyers were excellent. I anticipated high quality research and briefing, accompanied by vigorous and articulate argument. From a judge's perspective, what could be better?

Moreover, because Washington caselaw directs that initiatives passed upon public vote are presumed to be constitutional and cannot be held unconstitutional unless clearly proved to be so "beyond a reasonable doubt," I had immediately assumed that I would be likely to uphold the initiative. That sanguine view, so reassuring on initial assignment, did not last. As briefing came in, and as I researched the law, I found the challengers' arguments increasingly persuasive that the initiative had transgressed clear constitutional limits.

Speaking personally, the prospect of holding a tax-cutting initiative unconstitutional was a matter for profound worry. Like most state judges, I was elected, and as a general-jurisdiction judge in Washington I was subject to open election contests every four years. Worse, 2000 was a judicial election year. Worse still, the parties' stipulated schedule called for me to issue my ruling in March 2000, a mere three months before anybody with a Washington law license could simply pay a modest filing fee, register his or her name with the State, and run against me.

More than one judicial colleague suggested that if I were about to find the law unconstitutional, I should arrange to have the case reassigned to a retiring judge, who would not be subject to an election challenge. As appealing as that proposition sounded on a personal level, I declined the invitation. I feared that to do so would legitimately be seen by the public as compromising the integrity of the judicial system. Citizens could perceive any reassignment as proof that the judiciary and other members of the government were trying only to protect themselves and their income, that they hadn't given and wouldn't give fair consideration to the public's concerns.

So, instead, I focused on the fact that I had already had a good ten years on the bench, and decided that if my career were to be threatened or even terminated by a controversial decision either way, I would redouble my efforts to make the ruling be as fair and as clear as I could.

### MAKING THE DECISION ACCESSIBLE

With what I feared could be a premature end to my judicial career looming over me, I decided that the first step had to be giving the voters immediate and direct access to any ruling. I had to compose the ruling to allow non-lawyer voters, even those with no more than a high-school education, to have a reasonable chance of reading, considering, and then understanding my reasoning. I wanted to allow them not only to understand *what* I had ruled but to understand, and possibly even to appreciate, *why* I had issued that ruling. And of course, to do that, our court also had to find a way that the text could be made physically accessible to the public.

### Composition

How to explain to the public why I had to strike down what they had voted for, if that indeed were my final ruling? That

would not be easy. In my experience, parties on both sides stop paying close attention to judicial reasoning as soon as they know who has “won” and who has “lost.” Because justice suffers if losing parties believe they have not been heard, I had years before developed a practice when parties were present to hear an oral ruling to start by reciting and then addressing the losing party’s strongest arguments in an affirmative way. I would try to acknowledge the strength of those arguments, particularly those that were most emotive. Only then would I give the explanation of why those arguments, as compelling as they might otherwise seem, were legally insufficient; and, finally, I would announce the specific ruling.

Simply put, my general practice was immediately and affirmatively to recognize the losing party (only rarely does a losing party deserve immediate harsh commentary) and show genuine respect for their position. Savvy court watchers came to realize that in my court the first party to receive favorable mention would often be the party who was about to lose on the central issue. But the simple fact was that starting with the positives for the losing party would mean that the losing party would still have been able to listen to much of my ruling, rather than feeling shut out from the start.

So I planned to start my written decision on I-695 with positive acknowledgment of the losing party’s overall position. Nonetheless, however important it was to provide the losing party with affirmative recognition, I still had to face the question of how actually to write both the “what” and the “why” in plain English.

### **Drafting**

As to the writing process, it was obvious that I should not compose the decision as if it were a law-review article or an appellate brief. As simple as that goal is to state, making that choice would require a change from our normal patterns. The style of legal writing that most of us have been taught, starting from our law school days, is rarely clear. Trained as lawyers to rely on precedent, we somehow seem to have become convinced that we cannot think a thought unless somebody else has thought it before. We preface each point with the citation of cases or quotations, many of which, viewed honestly, are not really on all fours with the point being argued. And as judges we all know that when attorneys compose the briefing that they submit to us at trial or on appeal, all too many of them are driven by the misguided notion that simply increasing the number of citations will impress us or a higher court to rule in their favor.

This prevailing style of legal writing interferes not only with the flow of reading but also with the flow of reason. But because it is what we are used to, we not only tolerate it, we fall into the same trap. I wanted out of that trap. As my first step, I adopted a practice already known to and used by many trial attorneys: writing and speaking as if I were explaining my legal point to an interested, but not legally educated, neighbor. It works for attorneys presenting to juries. It ought to work just as well for judges explaining a point to the broader public.

I then applied one more drafting technique. Once I had completed my research, heard all the arguments of counsel, outlined the issues, identified the principles compelling the decision, and reached my key legal conclusions, I sat down and

wrote the decision straight through, in plain English, without turning back to my outline, and without any citations. I simply identified questions, principles and rulings, trying to do so as if I were talking with my neighbor. Only at the end of the drafting process, after I had summarized the arguments, my reasoning, and my rulings in what was as close as I could come to everyday English, did I go back to locate and insert the few necessary and central citations and quotes that I believed had required me to make the decision I had reached.

As a result, the text really did seem to flow much more readily. Interestingly, only weeks later, after I had completed and announced my ruling, whenever newspapers reprinted portions of the decision (one paper filled two full-sized pages with the entire text of my discussion from start to finish), case names and formal citation references were always eliminated. As a result, what remained on the newspaper page was in fact the very same wording I had started with, which I felt allowed my ruling to be more easily understood.

### **Distribution**

While my first task was to make my ruling intellectually accessible, I knew that step alone would not be enough. I also had to make the decision actually and physically accessible to any person who was interested. Those of us who are trial judges know that that simple concept actually points up one major problem we all face: then, as now, trial court rulings were not generally published in books or made publicly available in advance sheets or other official reporters. And, although it was little more than a decade ago that I was preparing to issue this ruling, the internet at that time had barely been utilized in any meaningful or user-friendly way by most state courts. Very few trial courts then had a public web page. Our court was no exception. We had no system that permitted legal professionals, let alone ordinary citizens, any internet access to court filings and rulings.

Despite these limitations, I was determined to find a way to help the public and the media understand both the ruling and the court’s assigned role. The parties had already stipulated that, whatever my ruling, it would bypass the court of appeals and be appealed directly to the Supreme Court of Washington. Our Supreme Court did have a web page at that time, so I contacted them. Because my ruling would be the very ruling that the Supreme Court would be reviewing, they considered it to be an essential element of the court’s record and the court’s business. Therefore, and particularly in light of the understandably great public interest in whatever the tax-related ruling would be, the Court agreed to have my ruling publicly posted on the Supreme Court’s own website immediately upon issuance. We arranged that I would electronically transmit my decision to Supreme Court staff ten minutes before it was to be announced in my court, so that it could be entered onto their web page (not an instantaneous process in 2000) and public access be enabled as soon as I had finished delivering my ruling in open court.

I should add here that, given the positive reaction our court system ultimately received for establishing this sort of access to a high-profile decision, our trial court developed a publicly accessible web page within the following year. On that page, we chose to include links by which the public and press could

immediately access rulings in any and all civil and criminal cases decided in our court that had a significant degree of public interest. A decade later, we continue that practice.

### **Oral Delivery**

Print and electronic media had been granted permission to be in the courtroom and to record and broadcast the delivery of the decision. Because we also expected large numbers of the public to attend, we scheduled the hearing in our presiding, and largest, courtroom.

The question of what words a judge should utter in open court is never a minor one and was doubly important in a case such as this. Among other things, the full decision was too long to be read out loud. In any event, delivering a lengthy ruling orally to the TV cameras could easily be viewed as grandstanding. On the other hand, entering the courtroom and simply handing out the decision, saying only, "This is the Court's ruling," and then departing, would present a different and two-fold problem. It could be viewed either as imperious or, alternatively, as a sign that the court feared and was dodging public scrutiny. Further, were I to choose to speak briefly but extemporaneously about my ruling and its reasons, I could by a careless choice of words inadvertently and unnecessarily create an appealable issue. With the complexity and significance of the case, that was not an idle concern.

To address these problems, I decided simply to read the introductory text from the ruling, plus a summary paragraph from each section of the ruling, so that every single word I uttered in open court would match key portions of the text word-for-word. Then, to facilitate public access and understanding, I also had these orally delivered excerpts from the ruling printed up in advance, for delivery to the press and public in attendance at the hearing; in the footer on each page we printed in bold type the specific web address at which the full text could be accessed.

This planned public access went off without a hitch. When the hearing was over, both the electronic and print media repeatedly recited not only the key portions of the ruling, but placed the web link on the screen on TV news programs and on the page in print media. As a result, thousands upon thousands of copies of the decision were downloaded on the first day, and were thereby immediately available across the State.<sup>1</sup>

### **INITIAL PUBLIC REACTION**

A ruling like this does not always face easy sailing. Not surprisingly, once I had issued the ruling striking down the public tax-cutting initiative, the initial response was outrage. It was public. It was immediate. It was vociferous. Within minutes of my departure from the bench, the charismatic sponsor of the initiative took the floor in the public section of the presiding courtroom and angrily denounced my ruling to the attendant television cameras as the action of a "king." Many members of the public slammed the decision. Many wrote angry letters to the press and complained on call-in shows.

Others sent letters and emails to me, with one threatening, "In revolutions we hang people like you from the nearest lamp-post." Another citizen called repeatedly over several weeks and left multiple messages on my court's answering machine, generally at 2:00 am, ranting about my decision and talking about how incompetent I was.

Although the tenor of public comment actually started to become more favorable in the weeks following the ruling, those initial responses were vehement. Stated in its most positive light, the thrust of the most obvious and vigorously argued objection was, given the fact that a majority of the public had voted in a particular manner, and that we had a democracy, "What is one man doing, overruling the vote of more than a million citizens?" That is a commonsense question, one that I had tried to address in the written ruling.

### **POST-RULING PUBLICITY**

Perhaps not too surprisingly, the written ruling had not fully satisfied those who asked that central question. In response to their continuing inquiries and emails, our court therefore also took a step that I would now either advise against or would modify in a significant manner. Because of the storm of immediate publicity, and the number of press requests for further information, the court leadership prevailed upon me to make myself available for press interviews.

Up to that time, I had never interacted with any media outside the courtroom about any of my rulings. Electronic and print media had long been free to attend in open court as long as their presence or conduct did not interfere with a fair hearing or trial, and they were always permitted to record and broadcast video of court proceedings. I had planned to continue this pattern here, and to let my words and actions in the courtroom speak for themselves, and not to speak with members of the press on any aspect of any ruling I either was contemplating or had made.

However, based on the canon of judicial ethics that encourages us to fulfill our duty as judges to educate the public about the law, I was asked by court leadership to meet with the press and fill them in on the judicial role in situations such as those presented by I-695. I agreed to meet with the press, but I also made it clear to them that I would answer questions about my training, and about the work of the courts and my work as a judge, but I would not respond to any questions about the substance of the ruling or make any comment that could otherwise relate to or affect the course of the appeal.

Of course I knew that, one way or another, if I met with the press, the central question about the judicial role in a democracy (the role of "one man") would likely be posed, directly or indirectly. I knew that if it were raised or even simply hinted at and I did not respond, or seemed to be dodging that question, it would hang over the interview, confirming the doubts of those who disagreed with my ruling and thought the ruling simply to be the political judgment of an "activist" judge.

After giving the matter careful thought, I felt I could address

1. As it turns out, given the significance of the case, Westlaw reported the full text of the decision online almost immediately; see,

*Amalgamated Transit Union v. State of Washington*, 2000 WL 276126 (Wash. Super. Ct., Mar. 14, 2000).



# THINKING LIKE A JUDGE: FIVE CHARACTERISTICS OF A JUDICIAL MINDSET

BY ROBERT ALSDORF

## 1. THE FUNDAMENTAL JUDICIAL MINDSET:

**They don't pay me to be right; they pay me to be fair.**

In virtually every case, all sides coming into a trial or a hearing think that they are right and are entitled to win. Their belief is often informed by and founded upon all manner of non-legal and non-judicial considerations.

When our first goal as judges is to be "right," we too are necessarily more likely to focus on the end result and do the same thing the parties do: that is, to apply goal-oriented measures, or a predetermined position on the law, or other preferences from outside the courtroom, and thereby advertently or inadvertently predetermine the "right" result.

When we try simply to be fair, then we have instead turned our focus to the process rather than the end result. Ironically, trying only to be fair causes us in the long run more likely truly to be right, at least in the eyes of the law, in large part because we are less likely to have closed our minds to a party's argument or otherwise prejudged a matter.

Adherence to process is at the core of the rule of law.

## 2. APPROACHING THE DECISION IN A GIVEN CASE:

**The most important person in the courtroom is the loser.**

The best judges are, in a very real sense, non-judgmental.

Our first job is not to decide; our first job is to listen. If we are careful to show the losing parties that they have been heard and direct our explanations to them, their attorneys and, in the long run, the parties themselves, will more easily accept our decisions.

The fairness of a legal system is probably best judged by the respect that a losing party has for the process and for the decision.

## 3. MAKING THAT DECISION:

**Neutral questions and standards are essential to the process.**

Pollsters know how to phrase a question to push the responder to a desired result. Likewise, attorneys know that if they succeed in posing the key question for the court, they are much more likely to win their case.

A judge's duty is different. How do we, as judges, pose a question that does not consciously or unconsciously predetermine the outcome? Can we ask a question in the manner of a truly neutral pollster? On the other hand, when the mere choice among several possible questions does effectively determine the result, how do we select which question to ask? What is the neutral principle of choice that we can identify for the parties as explaining and justifying our choice between or among competing questions? As judges, we should take the time to explain to the parties how and why we selected a particular question.

But first, we can set the stage during oral argument by telling the attorneys that when we ask a question in court, we want one of two things: either a direct answer to the question, or an explanation of why they believe our question misses the mark.

Finally, when trying to resolve difficult evidentiary issues that underlie a particular question of law, we can make a proper decision even when we haven't been able to figure out the answer to the question of whom to believe or what facts to rely on. We can resolve factual disputes as a matter of law: when we have tried our best and remain unsure of the facts, or determine that the evidence is evenly balanced, the party

having the burden of proof on that issue loses. I have found that parties readily understand, and can even come to fully accept, that concept.

## 4. CORRECTING FOR AND EXCISING BIAS BEFORE FINALIZING A DECISION:

**How do we minimize personal pre-judgments and predilections?**

Writing and then issuing a decision is the final step. But even a fair decision may fall short in the parties' eyes if we have not demonstrated fairness in our conduct in the courtroom, and even in our body language. Moreover, all of us can be affected by human factors: e.g., studies demonstrate that good-looking witnesses are generally deemed more credible than average-looking witnesses. We must ask ourselves and be prepared to explain, why do we believe witness A but not witness B? Have we really listened carefully to both sides?

And when we believe we have reached a decision in a hotly contested case, but before we have announced it, it is often helpful to identify an emotive factor that may relate to or be affected by a key issue in the case, and then figure out a way to flip it—e.g., the gender of respective spouses in a parenting decision, the ethnicity of alleged actor and victim in cases involving race, the parties' religious affiliations in a case involving the establishment of free-exercise clauses.

If we would still make the same decision after flipping that factor, we are probably on solid ground. However, if our decision would change, we'd better figure out why and either modify our decision or prepare to explain why that emotive factor makes a difference on the merits.

## 5. THE COURT IN A DEMOCRACY:

**The spirit of liberty is that spirit which is not too sure that it is right.**

We should set aside any personal preferences or initial reactions we may have to a given dispute and try to embody the philosophy of Learned Hand: "**The spirit of liberty is the spirit which is not too sure that it is right.**"<sup>1</sup>

It is not enough to "know" that we have reached the "right" decision. If we are too confident of the rightness of our own ideas or decisions, we are much more likely to be dismissive of, and not to listen to, those who appear to differ from us.

When ruling on a private dispute, we must be able to explain our decisions in a way that brings the affected persons along with us. And when ruling on a dispute that raises larger public or political issues, we must take care to explain not only the substance of our decision but also why it is the court rather than the legislature or other governmental body that properly decides the issue in that case or, alternatively, why the court is not empowered to make the requested ruling because it is required to defer to a legislative, executive, or administrative body's prior determination.

Genuinely exercising and expressing a degree of humility can actually enhance respect for the court's actions and rulings.

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1. Learned Hand, J., The Spirit of Liberty, Address, (May 21, 1944), in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND (Irving Dillard ed., 1953), at 144.

the question without talking about the substance of my particular decision but instead talking about the nature of the judicial role. This was the exchange I had in a television interview when the predictable central issue of a judge's role in a democracy was broached:

**Question:** Because of your ruling, some people have said that their vote doesn't count. Do you feel like you were in a no-win situation?

**Answer:** Not at all. I mean, this is a very reasonable question for people to ask: "What is one man doing? We had a million people vote in the following fashion..."

I think the best way to explain that is to say that if I am doing my job right, I'm not the voice of one man. When I do a case like this, I study the Constitution, I study a hundred years of decisions by our elected Supreme Court Justices. So I think, properly viewed, my decision is not *my* decision. This is not the voice of a man speaking, but really if I have done my job right, it is the voice of the law developed over a hundred years.

The press on that occasion did not try to ask further questions about the substantive basis for my ruling. Nonetheless, given the pressures on media representatives, we all know that that will not always be the case.

I have therefore thought long and hard about how we can in the future deal with inquiries that are fairly crafted, thereby assisting in public education, but still manage to avoid the risk of the ruling judge somehow tainting his or her ruling or the judicial process. There are in fact several possible, and less risky, alternatives that a court has other than allowing the judge who issued the ruling to be directly interviewed—alternatives that will still provide assistance to public understanding.

We tried one such method in our court in a high-profile case that occurred only a few years later. When a trial was being conducted of a serial killer with nearly 50 murders to his name, and lurid coverage was to be expected, we arranged for a judge who had had no contact with that trial and who would be walled off from any such contact (so that no inside information would even inadvertently be shared) to be made available to the press to discuss general court procedures and processes. And, in order not to transgress the ethical limitation on judges making any comments in a way that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing, all such communications were agreed to be off the record.

The process seemed to work well in that case, but there is an additional and likely even better alternative: given the occasionally difficult interaction of public officials and the press, it may make the most sense for a court not to have a judge perform such a task but to arrange to have one or more legal experts fulfill that educational role. It may be a court PR officer, if a given state's funding is adequate to allow it, or it may be a professor, a litigator, a former prosecutor or defender,

or some other experienced and reliable legal professional.

Whoever the chosen person may be, it is appropriate that we carefully consider how to fulfill our duty to help educate the general public about the role of and limitations on the courts. That is, it is important that we not only identify what our rulings are, but also explain why we can or can't perform certain tasks or undertake certain actions that the members of the public may wish us to take, or why we are required to take other actions that members of the public may oppose, and why a court's role in any given matter differs substantially from that of a legislature or other policy-making body.

## FINAL THOUGHTS

After only a few months, the initial ruckus had died down. The public's reaction, editorial pages, and letters to editors had all become significantly more positive. Of course, it probably also helped that the state legislature had by then finally taken action relating to the MVET. And in that more peaceful time, I received another telephone call from the man who had earlier left his repeated and hostile 2:00 am messages on my court answering machine. His new message was short and sweet. He actually apologized for the tenor of his earlier messages, and then said, "I still think you are wrong, but I have decided that you were doing the best that you could do."

What more can we ask for as judges, that a citizen who honestly and genuinely believes that we are in error actually also believes that we acted in good faith and were trying to be fair?

On the personal front, nobody filed against me, and near the end of that year, the Supreme Court of Washington affirmed my ruling by an 8-1 vote.<sup>2</sup> I retained my position on the trial court through 2004, after which I did choose to retire from the bench.

What did I learn from all this? Like the great majority of state court judges, I had held an elected position and had been subject to open public contests on a regular basis. That level of scrutiny can be a bad thing if it makes us fearful of public reaction, and it can be even worse if it makes us pander to vocal opposition or causes us to deliver the popular decision rather than the decision that is required by law. But, in a closely related phenomenon, and in what is barely the flip side of the coin, I found that being subjected to elections can actually be a good thing if it makes us more attentive to how we explain our rulings to the parties and to interested citizens.



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2. The Supreme Court's ruling is reported at *Amalgamated Transit Union v. State of Washington*, 142 Wn.2d 183, 11 P.3d 762 (2000).

Initiative 695 was affirmed in 1999 by a significant margin of the direct popular vote in virtually all areas of the State of Washington.

Its constitutional validity and its reach are now being vigorously questioned. These legal challenges, which raise questions fundamental to a democracy, were filed in several counties by citizens and by public and private entities alike. They have been consolidated in this Court for resolution.

### NATURE OF THIS DECISION

The United States and its individual states have long been guided by the adage that we citizens have a government of laws and not of men. In accordance with this cherished principle, court rulings must be made by reference to law and not upon personal whim. A judicial ruling on the validity and reach of a legislative act passed by an elected legislature, or of an initiative or referendum passed directly by the citizenry, is controlled by constitutional law.

Wherever we citizens fall on the political spectrum and whatever our ideas on any given issue, we all agree that the touchstone is the Constitution. For example, one citizen may challenge a particular act or law on the grounds that it violates his or her right to bear arms under the Second Amendment. Another citizen may contest yet another act or law on the grounds that it violates his or her free speech rights under the First Amendment. As citizens, we may and frequently do disagree on specific policies. Nonetheless, our agreement as citizens on a single point of reference, the Constitution, keeps American democracy healthy and viable.

Depending upon the issue involved, courts are required to refer either to the United States Constitution or to the Constitution of their particular state, or to both.

Because this set of cases involved the structure of the democracy established in the State of Washington, the questions presented for decision today are governed by our State Constitution.

The Constitution of the State of Washington was drafted in keeping with the legal traditions of the United States, which find many of their origins in the American Revolution. One of the central cries leading to the American Revolution was "No taxation without representation!" Echoes of that revolutionary spirit are found in the passage of Initiative 695. However, there is a vital distinction which commands brief discussion. The early revolutionary slogan expressed the sentiment that citizens wanted no taxation unless they were *represented* in the body that imposed the taxes. That is, we were establishing a *representative* democracy. In a representative democracy, citizens delegate authority to their elected representatives—legislative, executive and judicial—to decide certain questions on behalf of the citizenry. A representative democracy does not contemplate, let alone necessitate, a direct vote of the citizens on every act of the government, whether it be an act imposing, enforcing or collecting a tax, or some other governmental act.

In contrast to the representative democracies established after the Revolution, a *direct* democracy is one whose struc-

ture not only permits but requires a direct vote of the citizenry on every act of its government. No state has such a government in its purest form. However, in the early 1900's there was a strong populist movement in Washington and in other states which sought to permit direct participation in the government when a sufficient number of citizens wanted such participation. These populist movements established the right of the citizenry in more than twenty states to more direct participation by passing constitutional amendments that permitted citizens to file and vote on initiatives and referenda. The State of Washington is one of those states. As a result, the State of Washington now has a democracy whose structure has both representative and direct elements. Both elements of our democracy, direct and representative, are established by and are subject to the terms of our State Constitution.

The government of the State of Washington remains primarily *representative*. The *direct* participation of citizens in legislative activity is contemplated on those occasions when the citizenry affirmatively so chooses, in keeping with either the Constitution's initiative process or its referendum process.

In order to deal properly with the constitutional challenges raised to Initiative 695, one must keep in mind the distinctions between the representative and the direct elements of our democracy, and the manner in which these two elements interact under our State Constitution.

Each of these constitutional challenges will be addressed in turn below.

\* \* \*

Arguments may be made that we have a runaway tax-and-spend government and that we need radical systemic change in taxation or in other areas in order to make our governmental entities responsive to the needs and the will of the citizens. Some citizens will agree. Some will not. Whatever the wisdom of a particular proposed fiscal policy, the fundamental structure or system of our government can be changed only by constitutional amendment.

\* \* \*

Because the timely filing of a referendum with a sufficient number of signatures immediately suspends the operation of the challenged act or law, the Constitution exempts from the power of referenda all laws which are necessary to protect public health and safety (i.e., the police power) and those which are necessary for the support of the State and its existing public institutions.

The purpose of this portion of the Constitution is to assure that the government can continue functioning despite political differences of opinion. The reason for this limitation is rooted in history.

\* \* \*

If the Court redrafted Initiative 695 to require local referenda but prohibit State referenda, as both [proponents of the initiative] have urged, the Court would have rewritten the Initiative and caused it to address a topic narrower than and distinct from the loss of statewide MVET funding. That sort of redrafting would be a legislative act, and not a proper judicial function.

# Ten Tips for Judges Dealing with the Media

Steve Leben

Often judges are uncomfortable dealing with the media; many feel that the risks of bad coverage outweigh other factors. But when the public has an interest in a case pending in our courts, there's only one realistic way for most of the public to find out what's happening—through the media. Most judges will need to deal with the media at some time during their judicial careers.

I presided over two high-profile murder trials that drew national media attention, but I was lucky that my background left me comfortable with handling the media relations that surrounded those and other trials. I majored in journalism as an undergraduate at the University of Kansas, which has a top-notch journalism program. I worked part-time as a radio news reporter while in college. And I worked briefly as a press secretary to a Kansas congressman. These experiences, combined with the lack of a trained media representative on our court's administrative staff, made me choose to handle those tasks from within my chambers—and often personally—when trials in my court garnered media attention.

With only one exception (which I'll cover here), everything went very well from my perspective, and I think also from the media's perspective. This article aims to share some of what I learned. In addition, in preparing this article, I contacted several of the reporters and news editors who had worked with me while I was handling these cases. Their comments have also formed the basis for the ten tips for dealing with the media set out below.

**1. Don't consider the media as the enemy.** That suggestion came from Sam Atwell, the assignment editor for Fox 4 News in Kansas City. As he put it, "Our job is to inform the public and to work with the courts to get that job done."

Realistically, the media can't do their job effectively without help from the courts. So they naturally want to work with you as much as possible. Having a good relationship with them can't guarantee good coverage, but a store of goodwill never hurts. Even if a particular story has some bad sides to it, there's a much greater chance of balanced coverage if you have treated the media professionally and provided as much access as possible.

One example from a recent non-courts news story comes to mind. A story circulated about a potential NCAA rules violation by a major-college basketball coach. One day after the story broke, I noticed a piece on ESPN's website—quoting anonymous sources—essentially giving the coach's defense and a plausible interpretation of NCAA rules under which the coach might not have done anything wrong. By maintaining

contacts with the media members who cover their sport, major-college coaches are able to get out their version of a story when that's needed. Judges have to be careful about how we handle such matters, but the same dynamic is in play.

From a broader perspective, all judges are united in our belief that an independent judiciary is essential to the maintenance of a democratic society. But history is replete with evidence that an independent press is vital too.<sup>1</sup> Despite this common role (one that is too often undervalued by the public), many judges share the public's skepticism about the media. While there are some bad reporters—and some bad judges—the media writ large protect the rights of the people in a vital way. Judges should be willing to work with them as we separately play vital roles in preserving our democratic heritage.

**2. Set the right tone for your staff.** Most judges will communicate with the media through staff, whether a trained public-information officer, a person in the court clerk's office, or an administrative assistant. They will follow your lead.

Karen B. Russo, a producer with ABC's *Nightline*, long ago discovered how important this can be: "Everyone associated with the trial will look to the judge as an example, so if a judge is open or accessible or even slightly helpful, most everyone else will follow suit," including security personnel and court clerks. In the absence of the judge setting a tone of accessibility, she notes that staff may "be fearful of being 'caught' answering a reporter's questions on innocuous subjects like, 'How can I send a fax from here?'"

Russo makes another good point: "These small interactions can make a difficult trial a more pleasant experience overall, which allows us to focus on the real work: understanding the trial."

**3. Have someone available for media to meet with in person and to contact by telephone, even after hours.** If you want to make sure that coverage is accurate, media members need someone they can check facts with. In addition, they need someone to check with when there are questions (as there often are) about when the courtroom will be open and available, how seating is being handled, where cameras are allowed, or any number of questions that will arise. The media need someone who can be contacted by phone, email, or both.

One newspaper reporter told me that he has seen some public-information officers "who act as if they are being bothered when a reporter calls them," and others who aren't very well informed about court proceedings. I've known—and trusted—

## Footnotes

1. For an excellent overview, see JOHN HOHENBERG, *FREE PRESS, FREE PEOPLE: THE BEST CAUSE* (1973 updated ed.).

that reporter for years, so I'm sure his account is accurate. It's important to us to get accurate coverage, and we can't afford having contact people who don't want to be bothered or aren't willing to keep track of the information needed. Your only real ways to check up on this are to see whether the staff you're designating seems well informed and then to check with a media member or two to get their take on it as well.

A frequent happening during trials is that the court—or a jury—may work after regular court hours. In such cases, unless you've provided a cell-phone number or some other way to gain after-hours access to someone who can answer questions, the media may be at a loss to report accurate, up-to-date information. Particularly in today's media environment, in which newspapers and electronic media all must cover more stories with fewer reporters, reporters can't always stand by to await a jury verdict. Work out in advance a way to promptly get that information to any media members who have covered a trial. These days, email is perhaps the most effective means. You could even scan and send the jury's written verdict as an email attachment, which would help to make sure that it's accurately reported. (If you do so, though, you may want to redact the presiding juror's name if that's shown.)

Sometimes court staff may not want to give out a cell-phone number or be bothered after hours. Sam Atwell, the television assignment editor, urges that somebody provide such phone numbers, adding that "most members of the media will not abuse them." During the trials I held, media members had my email address and cell-phone number, and we were easily able to coordinate last-minute changes in the starting time for trial or other matters. No one ever abused that by making contact when it wasn't needed, and most of the contacts were conveniently handled by email.

#### **4. Find a way to provide information on background.**

Sometimes the reporters covering your trial are experienced at covering the courts, sometimes not. Even for experienced reporters, though, they can most accurately report the story if they can confirm some of the basic facts in some way.

Long-time Kansas City-area newspaper reporter and columnist Bob Sigman told me that, although attorneys could provide information, the one source he trusted was the judge. Judges who got to know him came to trust him. He told me, "[I]t took some time because I had to prove the judges that I was seeking only objective information. I found that once that was accomplished, they felt comfortable talking to me off the record." By being able to confirm his understanding of what had taken place, Sigman felt that he was able to provide a more informed and accurate story.

One key to all of this is to confirm with any reporter a judge speaks to personally how the information may be used and attributed. I generally spoke to reporters "on background," which I took to mean that they could use the information generally but couldn't quote me or attribute the information to me.

But there is no universally accepted definition of terms like this,<sup>2</sup> so you need to make sure—before the conversation—that each reporter confirms that he or she will abide by your intended ground rules. The key point is that if you don't want to be quoted (i.e., to have what you say appear in quotation marks attributed to a highly placed source in the courthouse), make sure that's agreed upon.

What might you talk with a reporter about on background? Judges differ on their views about this, and you must look at the judicial-conduct rules in your jurisdiction because those rules vary greatly.

Rule 2.10 of the 2007 ABA Model Code of Judicial Conduct provides that a judge "shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." In my view, if you are merely explaining procedures or making sure that reporters understand the rulings you have already made on the record in public portions of the trial, you aren't doing anything that should interfere with a party's ability to get a fair trial. The 2007 Model Code is consistent with that view in its additional statement that notwithstanding the restriction against anything that might impair fairness of the proceeding, "a judge may make public statements in the course of official duties [and] may explain court procedures." In addition, unless it would interfere with the fairness of the proceeding, "a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter." Whether you have these contacts or someone else does so on your behalf, the same rules apply.

I felt I was well served by helping to make sure that reporters understood my rulings, once they had been made orally in court or by written order. Most of the reporting accurately reflected what had transpired and what my rulings had been. By direct communication, reporters could also accurately learn things like how late we might be in session, when they could get in the courtroom, and how they could gain access to view exhibits that had been admitted.

Only once did I get burned. One television reporter who missed the start of court when I had ruled on something from the bench came back to my chambers at the first break. I explained to him exactly what had already happened in open court (which I had also explained in the media room on background for other reporters who had been on time that day). He went on the air that evening with something like this: "In an exclusive interview, Judge Leben told this reporter . . ." I had some email communications with him after that to explain my displeasure, and I never spoke with him again. He was the only reporter who was ever less than professional about these sorts of things, and I would admit that I should have had a more direct conversation with him about the ground rules since I hadn't worked with him before. I made the mistake of assum-

2. A 1994 article from the *American Journalism Review*, which is available online, provides quite a variety of understandings for the term "on background." Bob Woodward said it meant that he could "use it all" so long as he didn't identify the source, while a

Louisville newspaper editor said it meant that "you can use it only for your own information, just so you understand." See *On Deep Background*, AMER. JOURNALISM REV. (Dec. 1994), available at <http://www.ajr.org/article.asp?id=1621>.

ing that he would be equally trustworthy as the reporters I'd already worked with from the same television station; I didn't make that mistake again.

**5. Make it easy for them.** Who doesn't like for their jobs to be as easy as possible? So if you're committed to having a good relationship with the media, why not think about what you could do to make their jobs easier?

Let me give you one example. I've often found that witness names were misspelled in the newspaper, but sometimes that's because the attorneys had them wrong and reporters took the spellings out of the court pleadings. My court reporter always checked the spelling of a witness's name when that person took the stand, but it wasn't necessarily audible to media members in the back of the courtroom or in a nearby media room watching via closed-circuit television. So we provided cumulative lists of the spelling of all witness names at least twice each day to the media who were present in person or who had signed up for emailed information. (We automatically included all of the regulars, which included assignment editors.) Most media outlets are now putting information promptly on their websites, and having this sort of information accurately provided throughout the day helps them to be accurate. In addition to sending it out by email, we also put it on a dry-erase board in the media room we had set up in another judge's jury room.

In addition to providing witness names, we also provided electronic copies of all written court rulings, and we sometimes provided transcript excerpts for oral rulings of significance. When possible, I ruled in writing so that the record would be clear, something that helps both the appellate court and the media. And, of course, providing a good place for media to do their work whenever you can is greatly appreciated too.

**6. Understand deadlines.** Sometimes, journalists just can't wait until tomorrow. They have real deadlines, and with our increasingly 24-hour news cycle, the pressures on them are real. Try to have someone return messages in some way as soon as possible, and try to make sure that the needed substantive information can be provided promptly.

**7. Communicate with the media as soon as possible about key events.** This goes hand-in-hand with understanding deadlines. Time is of the essence to journalists. If you want accuracy and the court's side of things to be part of the story, you need to provide it before the story is written.

If you have a big trial coming up, make contact in advance with the media who are likely to cover it. Get the ground rules in place, figure out where the media can work while they're at the courthouse, and designate a contact person for them.

If you're about to issue a ruling in a case, you can advise them that a ruling will be issued at a certain time. You can then provide it to them electronically. (Of course, be sure you give it to the parties in advance of that or at the same time.) Many media outlets will post your written decision on their own website, which helps to make sure that the public gets exactly the information you thought was most important about that decision. Of course, you'll also want to make sure that your written decision is written in plain language, not legalese.

**8. Don't impose restrictions unless it's really necessary—and explain them when you do.** Let's consider another example. Kansas City television news reporter John Pepitone told me that he'd seen a recent trend toward allowing video coverage of court proceedings but no audio recording of them. He rightly noted that this has made his job harder: "It's already difficult to hear what is being said in many courtrooms. When I can record the sound, I can replay it so that I make sure I get it right. To accurately quote someone is an important part of our job, and I'm sure the court system wants us to get it right as much as we do."

I don't know for sure what has led to this trend among some judges, but I suspect that they're afraid of having things picked up on the microphones that aren't intended to be part of the record (like what a defendant might say at counsel table to his or her attorney). Maybe other judges have had more of a problem with that than I did. When there was full coverage of a trial in my courtroom, I had a "kill" switch to turn off the microphones being used for the television feed when appropriate, and the ground rules agreed upon in advance stipulated that no conversations between the defendant and counsel could be recorded (and that they couldn't be used if they were accidentally picked up).

Whatever the perceived problem may be that has led some judges to ban audio, I would hope that they might reconsider the decision and try to find another way to solve the problem that would still give the media audio access to most of the proceeding. That helps to ensure accuracy, as Pepitone notes, and also provides equal and fair access to radio coverage. If no solution other than banning audio can be found, however, judges should explain why they have any rules that limit access. Reporters shouldn't be left to wonder why access has been restricted. In addition, Pepitone's comments suggest that the judges who have imposed these restrictions haven't made either themselves or court staff available to discuss the ground rules for court proceedings; if they had done so, Pepitone, a good reporter, would have had some idea why this trend was taking place. I would suggest that if the judges and media members involved talked about whatever concerns are driving these access restrictions, a mutually agreeable solution could be found.

The same advice applies to the limitations on what you can and can't say to reporters. Explain those limitations, and reporters will respect them. Two reporters suggested to me in response to my inquiry that it can be quite helpful to have written guidelines for your court about what the media can do and what the limits are. That seems especially good advice since you'll periodically encounter reporters who haven't been there before, and even seasoned reporters can have trouble remembering the idiosyncracies of courts throughout their coverage area.

**9. If you don't know something, don't try to answer.** The law is complicated, and none of us knows everything that might come up during a trial. If you're asked something procedural or legal during a background session with reporters, don't guess. If it's something like the elements of the crime charged, you can offer to get them a copy of the pattern jury instruction. (Or, if you've given preliminary substantive jury

instructions giving the elements of each crime charged, hopefully you already provided that to reporters at the start of the trial.)

**10. Prepare.** The coverage of court proceedings is important. It shapes public opinion of the court system, and fair coverage promotes fair trials. Given its importance, judges should focus on preparing to handle our dealings with the media just as we must prepare to tackle complicated legal issues, the procedural aspects of court hearings, or supervision of our staff. These are all important parts of our job.

For a general guide, there's a 58-page monograph prepared by the National Judicial College.<sup>3</sup> It provides an excellent overview, with checklists for handling media issues during a trial, a glossary of media terms, ethics rules followed by professional journalists, tips on handling television interviews, and advice for handling ambush interviews.

When you're actually going to talk with the media, prepare yourself by thinking through the main point you want to make. With limited time and space for stories, that may be all that you can get across, and you should make sure that you at least make that one point in clear language and a short sen-

tence or two. If it's an on-the-record interview about your court generally or some new initiative your court has started that you want the public to know about, you need to say something that's short and quotable. Even if it's an off-the-record interview for background purposes, keep the main point in mind and keep your language simple. That will enhance the chance that the reporter's understanding of what you're trying to say will correspond to your own.



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*Leben is a 1982 graduate of the University of Kansas law school, where he has taught a course on statutory interpretation since 2007, and a 1978 graduate of the William Allen White School of Journalism at the University of Kansas.*

3. THE DONALD W. REYNOLDS NATIONAL CENTER FOR COURTS & MEDIA IN THE NATIONAL JUDICIAL COLLEGE, TOOLS FOR JUDGES AND COURT PERSONNEL TO DEAL WITH THE MEDIA (undated). The Indiana state judiciary has posted this monograph and other materials that may be helpful to judges in dealing with the media on its website at

<http://www.in.gov/judiciary/pubs/media-guide/fire-brigade.html>. Although the National Judicial College monograph as found there is undated, a version of it was produced in 2006 (available at <http://www.nacmnet.org/PastConferences/2006Annual/HengstlerHandout.pdf>).





# On Courts and Communication Strategies:

## Book Review of Pamela D. Schulz, *Courts and Judges on Trial: Analysing and Managing the Discourses of Disapproval*

Andrew J. Cannon

PAMELA D. SCHULZ, *COURTS AND JUDGES ON TRIAL: ANALYSING AND MANAGING THE DISCOURSES OF DISAPPROVAL*. Lit Verlag, 2010, 290 pp. \$76.00.

This book is a broad-ranging and detailed discussion of the sometimes fraught relationships between courts, politicians, and the media. The author combines her practical experience as the first public relations and information officer with the Courts Administration Authority in South Australia with in-depth research as a communications analyst. She has analyzed media and their practices both in Australia and worldwide. This has revealed much of interest about the motivations and methods of journalists, politicians, and judges, as well as implications for community confidence in the court system and the rule of law in modern democracies. Schulz concludes by offering some practical solutions to the problems she has identified.

Courts have no direct power over citizens and merely mediate executive power by validating arrest on charges, authorizing the exercise of the power of fining or imprisonment, and quantifying and collecting judgment debts. To effectively perform their work, courts depend upon the confidence of the public in the judicial process. There are very few judges, and relatively few cases, especially in the common-law system, so the overwhelming source of information for the general public about courts is the media. Yet the media selects the bizarre and sensational rather than the serious. As Schulz says, “[i]f it bleeds, it leads,” and content is selected on the basis of the “four C” principle: courts, cops, crime and conflict.<sup>1</sup> Schulz contends that in a western world of relative safety, the media and politicians have created a climate of fear of violent crime to prop up their own relevance. Crime is depicted as a major problem, and getting “tough on crime” is the simplistic solution. Part of this process is to make stories newsworthy by finding cases where there is discontent about the result, which is then beaten up as part of a discourse of disrespect against the judicial process as a whole. Straight reporting is demoted in importance in preference for conflict, problems, and denouement.

Schulz notes that courts have used journalists in the role of

public information officers to better supply information to the community on the courts’ own terms. However, she considers that they have not been successful in bringing the generally good work of courts to the attention of the public. To be effective, courts must have communication strategies that are proactive and interactive and provide access and feedback loops through a wide variety of pathways. In addition to a broad range of communication strategies, courts must become more directly involved with the public through community and specialist courts such as drug, mental-health, and first-nation or Nunga courts that link directly with community services.

Schulz develops her discussion through the discipline of critical discourse analysis. This is a communications study method that seeks the sometimes unstated meanings in communications by looking for patterns of words and phrases and their proximity to each other and conversely by what is systematically avoided or suppressed. She identifies a general discourse of *disapproval* of courts in the media that has developed into discourses of *disrespect*, *diminution*, and *direction*. This leaves judicial officers feeling marginalized and threatened, while politicians have joined in so that they can be seen as saviors from the problem, which is largely a media construct. Schulz identifies the use of the technique of “othering,” by which a small group is branded and demonized so that the majority can find a sense of unity in coming together with a sense of rectitude to eject them. This technique, of course, has a long unhappy history, and the marginalization of the judiciary has always been a first step in the process. In this instance, the technique has been applied first to criminals who should be locked away for longer and to judges who fail to do this.

Her interviews of politicians demonstrate a disconnection between their stated understanding of and commitment to the rule of law and the independence of the judiciary. At the same time, politicians think that the courts need “direction” from them to address changing community standards, especially in sentencing matters, which are the fodder of the press.<sup>2</sup> They acknowledge that the judicial role is not to be popular but to apply the law “without fear or favor, affection or ill will.”<sup>3</sup>

### Footnotes

1. PAMELA D. SCHULZ, *COURTS ON TRIAL: ANALYSING AND MANAGING THE DISCOURSES OF DISAPPROVAL*. 4 (2010).
2. *Id.* at 46.

3. This is the usual common-law judicial oath. See, for example, Section 11 of the *Oaths Act 1936* (SA). See discussion of popularity, SCHULZ, *supra* note 1, at 112.

Although politicians acknowledge the central importance of judicial independence in interviews with the author, Schulz demonstrates that the same approach often is not reflected in public comments made to the media. While it is the work of courts to make nuanced decisions in controversial cases, when they do, this has sometimes been described as “an unelected and unaccountable judiciary usurping power” (judges are not elected in Australia or Britain).<sup>4</sup> Politicians do emphasize the need for the language of law and judgments to be accessible, and from their comments the author draws the need for a media judge to enter the media arena on behalf of the judiciary.

Schulz has assessed the view of the judges through discourse analysis of interviews of selected judges from all levels of the judicial hierarchy in Australia and of their speeches. What emerges is a primary concern about independence, and parallel to this is an inevitable tension between the judges’ need to have a relationship of confidence with the community and politicians and the isolation, which is inherent in their role. They feel misrepresented and misunderstood.

Schulz uses Foucault’s approach to power to suggest that the widespread formation of a negative response is indicative of an emerging challenge to power, which she sees as a challenge by elected government to the authority and independence of the judiciary. Who leads this dance between the media and the politicians is uncertain, but at this ball the judiciary is the wallflower, and anyway, traditionally it would refuse to dance in this infotainment world of modern media. The Foucault approach relegates the great events in history to tipping points preceded by multiple strands of discourse leading inexorably to the inevitable result, and then the tipping point is exaggerated as the cause when it is largely the result.<sup>5</sup> Not to be involved in the discourse is not to exist and is to risk the loss of relevance, power, and the independence so valued by the judiciary. At the same time, discourse analysis shows a judiciary that is protective of its own methods and unwilling to join public controversy. The author recognizes that a commitment to a rule of law is bound to lead to unpopular decisions. Indeed, it is the judiciary that stands between a tyranny of the majority and populist oppression as they moderate the exercise of governmental power. Schulz identifies an increasing recognition in the judiciary of the need to defend the notions of independence and the rule of law in the media and to better educate the community through civics education and similar means. But many of its members, as is typical with the marginalized “other,” feel powerless and are defensive.

Schulz concludes that in the face of headlines about a court judgment such as “THIS IS NOT JUSTICE—THIS IS A DISGRACE,” the present role of a journalist information officer, which entails ensuring accurate information is supplied to media, holding court open days, giving school tours, and

speaking at community events and the like, is not sufficient.<sup>6</sup> She says a fully integrated and sustained communications strategy is required, starting with using discourse analysis to identify the misconceptions that need to be countervailed. To address these misconceptions, the author would have press judges, who do not sit so they can engage in discussion of public controversies, and communication managers, who ensure courts do react effectively to community concerns and express themselves so that they are understood. A range of other measures—such as a roadshow to showcase the sentencing process, direct access to the community through cameras in courts, and interactive websites—are recommended to make the work of courts accessible and to provide contextual information to the few cases the media choose to highlight. Judicial participation and knowledge of discourse analysis is also suggested to further ideas for better communication.

Criticism of courts is not new. For example, in 1934, the High Court of Australia granted a writ of habeas corpus<sup>7</sup> to release a left-wing Czech journalist who had been detained as an illegal immigrant by order of Attorney General Robert Menzies to prevent him speaking at a conference. In response, the *Sun* newspaper railed against the judges: “If the High Court were given some real work to do the bench would not have time to argue for days on the exact length of the split in the hair, and the precise difference between Tweedledum and Tweedledee.”<sup>8</sup>

Times now are different. In that case, the editor and the paper were each fined for contempt,<sup>9</sup> which is unlikely to happen now. And today, with the shift of the power from the nation-state toward corporate interests, some of which have a worldwide controlling interest in the media, politicians and media share a new common interest: to maintain a discourse of threat and sensation and to diminish the judiciary, whose independence puts the judiciary outside their control.

Neither can it be said that the courts have no blemish. Their independence gives them control over process and costs, and they tolerate excessive delay and overindulgent expense on sometimes irrelevant pretrial processes that have driven the cost of litigation beyond the reach of the bulk of the community. As Justice Dyson Heydon recently said in the High Court:

The presentation and adjudication of the case in the courts below do cause it to merit a place in the precedent books. The reasons for placing it there turn on the numerous examples it affords of how litigation should not be conducted or dealt with. The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other.<sup>10</sup>

4. *Id.* at 159.

5. MICHEL FOUCAULT, *THE ARCHEOLOGY OF KNOWLEDGE* (trans. Alan M. Sheridan, 1997).

6. This headline ran in the tabloid, *The Advertiser*, <http://www.adelaidenow.com.au/>, on July 30, 2003.

7. *R v Wilson; ex parte Kisch* (1934) 52 CLR 234.

8. *The King v Dunbabin; Ex Parte Williams* (1935) 53 CLR 434, 436.

9. The paper was fined 200 pounds, and the journalist 50 pounds. *Id.* at 448.

10. *Aon Risk Services v Australian Nat’l Univ.* (2009) HCA 27, 156, available at <http://www.austlii.edu.au/au/cases/cth/HCA/2009/27.html>.

Courts must accept valid criticism and be prepared to remedy properly identified problems. However, that is not Schulz's focus. Her point is that there is much damaging discourse about courts that is merely criticism for ulterior purposes not based on any merit. Media discourse reformulates rather than reflects reality as the media competes with executive government and the judiciary to represent justice and the common good. Political and media use of law-and-order rhetoric undermines public confidence in courts and the rule of law that it masquerades as discussing.

The research on which this book is based is Australian, but the author includes material from the UK, USA, Canada, India, and Europe, and the book has a broad international relevance to foster discussion in this important area. It is scholarly but readable for general interest, so the book will serve both as a text for interest as well as a course book in progressive law schools and communications faculties.



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## PROPOSED AJA BYLAWS CHANGES

*Editor's Note: These AJA Bylaws amendments have been submitted by the Bylaws Committee for consideration at the AJA Annual Conference in San Diego this September. There are four separate proposals; the comments shown are from the Bylaws Committee.*

*Deletions are shown in ~~strike through text~~. New language is shown in italics.*

### I. Proposed Membership Provision Changes

Purpose: Clarify that judges from “ecclesiastical” courts and judges who have been suspended or removed from the bench are not eligible for membership.

Specific changes proposed:

#### ARTICLE III MEMBERSHIP

Sec. 1. ELIGIBLE COURTS. An eligible Court is defined as any duly constituted ~~judicial tribunal, serving at the local, community, State, Provincial or National level within the United States, any of its territories and possessions, the District of Columbia and Canada and Mexico, whether having trial or appellate, criminal, civil, or special jurisdiction. Such courts do not become ineligible by reason of being State, Provincial, or territorial Courts or by reason of having jurisdiction beyond the boundaries of the Governmental subdivision in which such courts are located. Courts of Indian Nations of the North American Continent and Magistrates, Masters, Arbitrators, Referees of any eligible judicial tribunal, if otherwise qualified, shall be eligible on the same basis.~~ *court of the federal, state, local, tribal, provincial, and/or territorial governments of the United States, Canada, Mexico, and any other countries within North America.*

Sec. 2. VOTING MEMBERS. Upon payment of the dues herein prescribed and upon approval of the application by the Board of Governors at any regular or special meeting, any present or former judicial officer *in good standing, or any former judicial officer who was in good standing at the time of separation, whose present or former court meets of any court, meeting* the qualifications of an eligible court as herein before defined, may become a regular voting member. The right to approve applications for memberships may be delegated by the Board of Governors.

### II. Proposed Dues Provision Changes

Purpose: Allow for additional dues options besides annual payment, including the option of a discount for advance payment for multi-year membership.

Specific changes proposed:

#### ARTICLE IV DUES

Sec. 1. PAYMENT.

(a) Dues for membership in the Association are payable ~~annually~~ *per a schedule approved by the Board of Governors and payable by the Court over which the individual member Judge presides.*

(b) In the event a Court for any reason, fails to pay the dues of its Judge or Judges, any qualified Judge may apply for individual membership and be personally responsible for payment of dues.

(c) Honorary members shall not be assessed for any dues.

Sec. 2. RATES

(a) Dues shall be established ~~at an annual rate by a schedule approved by the Board of Governors. Any formal or informal association of five or more judges paying as one unit will be eligible for a discounted rate as set by the Board of Governors. The Board of Governors may also establish an annual, reduced rate for retired judges.~~

**III. Proposed Bylaws Amendment Procedure Change**

Purpose: Reduce costs by allowing for electronic notice of proposed bylaws changes.

Specific changes proposed:

**ARTICLE XVIII  
AMENDMENTS TO BYLAWS**

The Bylaws may be altered, adopted, amended or rescinded only by the majority vote of the members present and voting at the General Assembly of any Annual Conference provided, however, that notice of the proposed action of adoption, amendment or rescission shall have been given by the Secretariat or by the proponent of the proposed action to the members of the Association and to the members of the Board of Governors either by mail, *by electronic mail and publication on the AJA website*, or by publication in an official publication of the Association posted not less than thirty (30) days prior to such meeting; or by consent of two-thirds of the members present and voting at the General Assembly of any such Annual Conference if thirty (30) days notice has not been given. Publication in any official publication, mailed to the membership at least three times a year, shall constitute compliance with the afore-said notice requirement regardless of the date of publication or mailing. The publications referred to herein are intended to mean the official publications of this Association by whatever name or title they may bear.

**IV. Proposed Bylaws Change to Add At Large Representative to Board of Governors**

Purpose: Address concerns raised at Denver General Assembly about general membership representation on governing bodies of AJA, by providing for an at large representative to the Board of Governors

Specific changes proposed:

**ARTICLE VII  
BOARD OF GOVERNORS**

...

Sec. 2. COMPOSITION. The Board of Governors shall include as members:

...

(e) ...

(f) *An at large representative who shall represent the general membership of the Association. The at large representative shall be a duly qualified member of the Association, who is not at the time of initial election to this position a currently serving member of the Board of Governors.*



# The Resource Page



## NEW PUBLICATIONS OF INTEREST

PAMELA M. CASEY, ROGER K. WARREN, & JENNIFER K. ELEK, *USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP*, National Center for State Courts, 2011. 48 pp. <http://www.ncsc.org/RNAPrinciples>

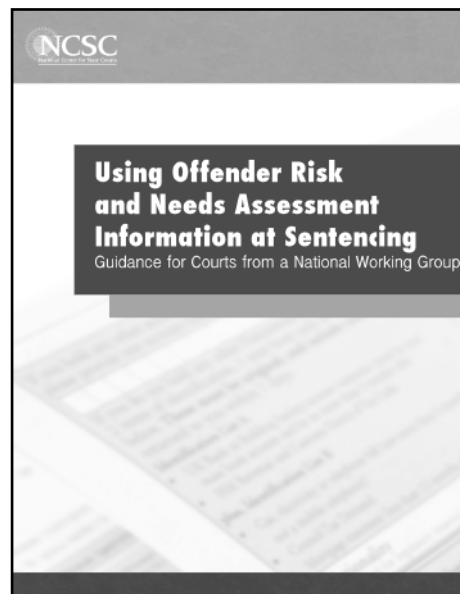
Recent studies have exposed offender recidivism as a major public-safety issue that the courts need to address. Out of a sample of 275,000 prisoners who were released in 1994, two-thirds were arrested again within 3 years. Reports indicate that 1 in 31 adults is currently under criminal supervision. Of course, judges have some sense of local recidivism rates, as they see the same offenders over and over in the courtroom. But the public is also aware of the high level of recidivism, and general perceptions of public safety and the criminal-justice system suffer as a result.

The good news, according to this new guide from a national working group, is that a clear path to improvement exists. The guide suggests that courts can use more detailed information about the risks and needs of an offender to significantly lower the offender's chances of being rearrested.

Published by the National Center for State Courts, the guide informs judges, attorneys, and other legal stakeholders about how to implement or enhance risk-and-needs-assessment information in their jurisdictions. These assessments detail an offender's dynamic risk factors—that is, the factors that may still be changed—including personality pattern, social supports for crime, substance-abuse issues, and family relationships. The working group, chaired by recently retired Alabama Chief Justice Sue Bell Cobb, recommends that courts integrate this individualized assessment into every

stage of the sentencing process, from plea-bargaining to probation.

The guide calls for judges to focus on reducing recidivism as a primary goal of sentencing. Appropriate classification of offenders using risk-and-needs-assessment information, in combination with appropriate sentencing using the same classification, can reduce recidivism by up to 26%. And research cited in the guide suggests that “[a] potential decrease of even 5 or 10 percent in the rate of recidivism is significant given current rates of reoffending.”



As any systemic change is difficult to initiate, the working group offers nine principles to help courts move to a more evidence-based system of sentencing. The first few principles state that risk-and-needs-assessment information should inform matters such as probation conditions, but should not be used as an aggravating or mitigating factor in determining the offender's sentence. Risk-and-needs-assessment information is valuable when considering whether an offender can be effectively supervised while on probation, and it can aid in determining probation conditions as well as proper responses if the conditions are not met.

The guide then turns to education and training. For an evidence-based system to

be successful, all stakeholders—the judge, the defense attorney, the prosecutor, the probation officer, victims advocates—must be comfortable using and interpreting risk-and-needs-assessment information. Training can be done through conferences, workshops, and even webinars, including those conducted by the Crime and Justice Institute.

To build an efficient evidence-based system, the entire infrastructure of a probation department or assessment agency should factor in the risk-and-needs-assessment report for each offender. An assessment report should be made available to all parties at each stage of a sentencing process, and the parties should be encouraged to use the report during deliberations about appropriate probation conditions.

Each jurisdiction must select tools for integrating risk-and-needs assessments based on its individual resources and needs. Judges must consult with other agencies to determine the length, formatting, and content of the reports, and the data should be routinely reviewed so that any necessary modifications may be made to increase accuracy. When a jurisdiction is establishing a new system, periodic evaluation is crucial to avoiding damaging misclassifications.

The guide concludes by calling on judges to lead the way in implementing risk-and-needs-assessment information. If a jurisdiction already uses limited evidence-based practices, judges can seek to increase the use of such materials in other areas. Other jurisdictions will need to begin from the ground up with judges advocating for funding, bringing colleagues and other legal actors on board, and discussing the future implementation of risk-and-needs-assessment information.

At every stage, the guide suggests, it's necessary for judges to explain the clear benefits of using risk-and-needs-assessment information: improving public safety, reducing recidivism, and, in many cases, reducing excessive costs associated with incarceration.